APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-11

JAMES R. JAMES, Judicial Administrator, Et Al.,
Appellants,

vs.

DAVID E. STRANGE,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MATTHEW J. DOWD
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State House
Topeka, Kansas 66612

Of Counsel
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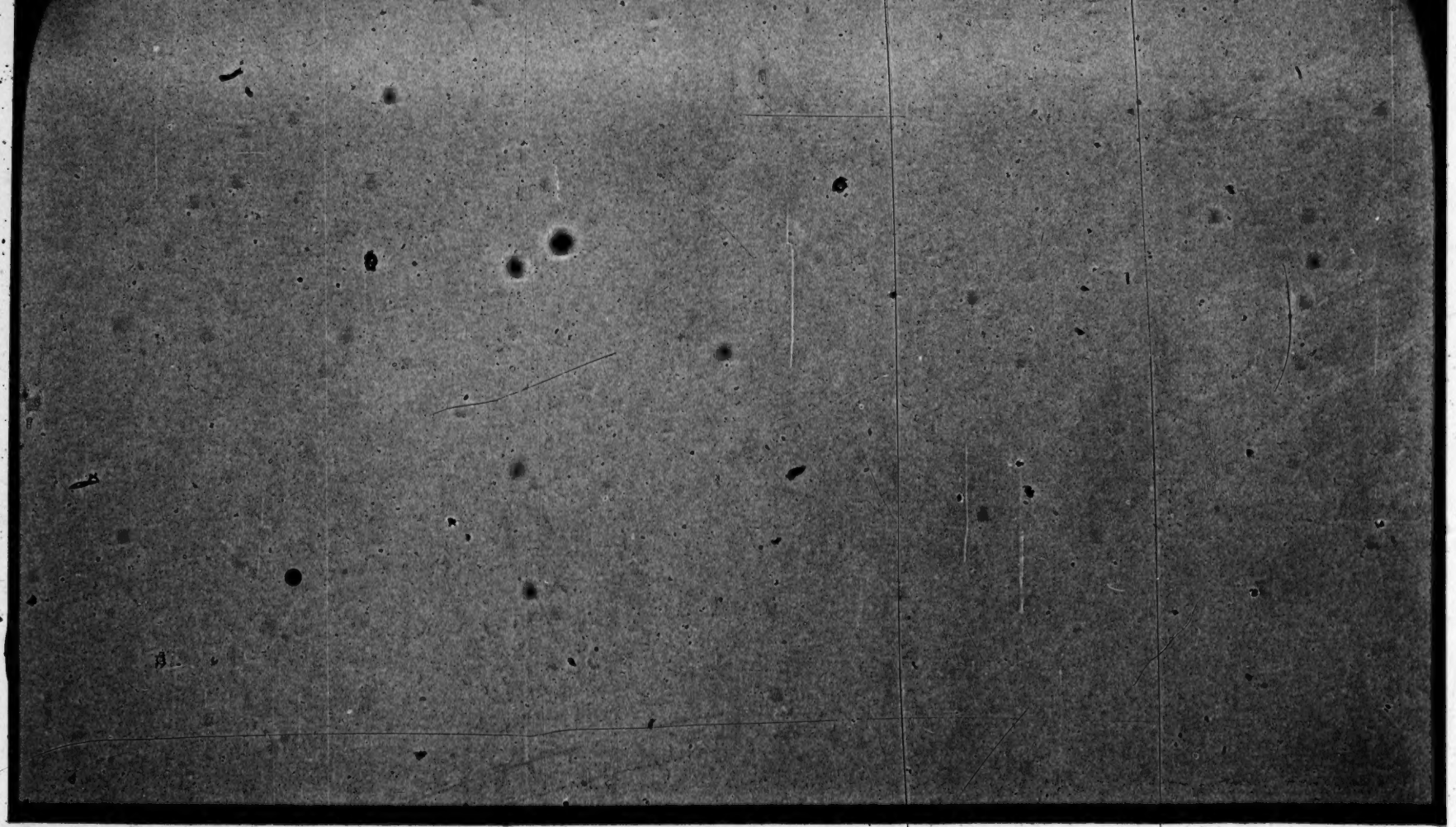
FILED JULY 1, 1971
JURISDICTION NOTED DECEMBER 7, 1971



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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

DAVID E. STRANGE,

Plaintiff,

vs.

JAMES R. JAMES, Judicial Administrator,

and

THE STATE OF KANSAS,

Defendants.

No. T-4713

COMPLAINT

(Filed January 30, 1970)

The plaintiff for his cause of action alleges and states as follows:

Jurisdiction

1. The plaintiff invokes jurisdiction of a three-judge United States District Court under the provisions of 28 United States Code Annotated, Section 2281. He bases his reason for invoking the jurisdiction of this Court on the facts that will be more fully set out herein.

Parties

2. Plaintiff is a United States citizen who resides in Topeka, Shawnee County, Kansas.

3. Defendant, James R. James, is the duly appointed Judicial Administrator of Courts which position is provided for in the Kansas Judicial Department Reform Act of 1965. (K.S.A. 20-318.) Defendant James may be served with summons at his office on the third floor of the State House, Topeka, Shawnee County, Kansas.

4. The State of Kansas is named herein as a defendant because this action questions the constitutionality of the Aid to Indigent Defendants Act of the State of Kansas, K.S.A. 62-3101 et seq which became effective July 1, 1969. In such circumstances notice must be given to the Attorney General and Governor of this state under 28 United States Code Annotated Section 2284(2).

Statement of the Case

5. The plaintiff, David Strange, was arraigned on the charge of robbery first degree (K.S.A. 21-527, 530) in the Magistrate Court of Shawnee County, Kansas on July 2, 1969. The record shows that David Strange at that time was advised of his right to counsel and to trial and to a preliminary hearing. His bail was set at $5000.00. He was placed in the Shawnee County jail, being unable to post a bond for bail. On July 3, 1969, a warrant was returned, filed and served upon David Strange. On July 10, 1969, Magistrate Judge Stephan J. Kritikos requested

that Attorney John Wilkinson represent David Strange on that same date the Court found David Strange indigent and appointed John E. Wilkinson to represent him in the felony charge. Attached hereto and made a part hereof by reference is the complete Shawnee County District Court file.

6. At no time was David Strange advised of the provisions of Section 13(a) and 13(b) of Chapter 291 of the Session Laws of the State of Kansas 1969 (K.S.A. 62-3113). These sections provide that any money expended by the State to appointed counsel which would be of aid to an indigent defendant, must be paid back by the indigent defendant within a particular time. Failure to so pay will result in a judgment against the indigent. This judgment is "like any other judgment." That is, there could be an execution, a garnishment, or any other proceeding in the aid of execution of the judgment.

7. On August 19, 1969, David Strange plead guilty to the felony of pocket picking as defined by K.S.A. 21-2422. David Strange's plea of guilty was accepted by the Court.

8. August 22, 1969, David Strange was sentenced for the felony offense of pocket picking to a term of imprisonment for a term of three years; the Court ruled that the execution of this sentence of imprisonment whould be suspended and that David Strange be placed on probation for a period of three years.

9. David Strange was 18 years of age at the time he plead guilty and was sentenced. This was his first felony offense.

10. Subsequent to release on probation, David Strange has obtained employment. He has worked steadily at a very modest wage. In addition, he has gotten married.

11. On August 29, 1969, John E. Wilkinson filed his Voucher for services rendered to David E. Strange.

12. In December, 1969, the State expended from the Indigent Defendants Fund the sum of $500.00 to David Strange's court appointed counsel, John E. Wilkinson. On December 9, 1969, James R. James, pursuant to the provisions of K.S.A. 62-3113, sent to David Strange by certified mail, notice requesting payment of the sum of $500.00 which had been expended for David Strange's defense as an indigent. The notice provided that he had until February 4 1970 to pay $500.00 to the Supreme Court.

13. The plaintiff David Strange verily believes Section 13(a) and 13(b) of the Statute (K.S.A. 62-3113) is unconstitutional and that it deprives him of his right to counsel as guaranteed to him by the Sixth Amendment of the United States Constitution, which is made mandatory upon the states by the Fourteenth Amendment to the United States Constitution.

14. The Sixth Amendment of the United States Constitution and decisions interpreting it, particularly *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799, 93 ALR 2d 733, guarantees counsel to indigent persons charged with felonies. The need for counsel in serious felony situations should not be infringed upon or even defeated by requiring that an indigent make a decision as to whether or not he wants to take the risk of being able to pay back the money being expended on his behalf.

WHEREFORE, plaintiff prays: (a) that this Court issue a temporary restraining order restraining and enjoining the defendants from proceeding under K.S.A. 62-3113 until a hearing on the preliminary injunction can be had; (b) that notices be sent in accordance with Section 2284, 28 United States Code, for the hearing on a preliminary injunction; that the Court enjoin these de-

fendants until there can be a final determination of the action; (c) that the Court cause a "Three-Judge U.S. District Court" to be convened and that that Court issue a permanent injunction restraining and enjoining the defendants and each of them from proceeding under K.S.A. 62-3113 in this case; and (d) that the duly convened three-judge court find that K.S.A. 62-3113 is unconstitutional in that it infringes upon the right in guarantee of counsel as provided by the Sixth Amendment of the United States Constitution and constitutes a denial of the process guaranteed under the Fifth Amendment of the United States Constitution, all of which is obligatory upon the State of Kansas by the Fourteenth Amendment of the United States Constitution.

/s/ John E. Wilkinson
John E. Wilkinson
708 First National Bank Building
Topeka, Kansas
CE 2-0564

STATE OF KANSAS)
) ss.
SHAWNEE COUNTY)

JOHN E. WILKINSON, of lawful age and being first duly sworn states that he is the attorney for plaintiff in this cause; that he has personal knowledge of the facts alleged in the foregoing complaint and according to his best information and belief all of the allegations thereof are true.

/s/ John E. Wilkinson
John E. Wilkinson

Subscribed and sworn to before me this 30th day of January, 1970.

/s/ Wilma Feerer
Wilma Feerer
(Seal) Notary Public

My Commission Expires: March 25, 1973.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

DAVID E. STRANGE,
Plaintiff,
v.
JAMES R. JAMES, Judicial Administrator, and THE STATE OF KANSAS,
Defendants.
No. T-4713

STIPULATION OF FACTS

(Filed February 26, 1970)

In accordance with an Order entered by Judge George Templar at the hearing on a temporary injunction direct-

ing the parties to stipulate as many facts as possible, the parties submit the following stipulations of fact:

1. On July 2, 1969, David Strange, age 18, was charged in Case No. 69-CR-592 by complaint with the offense of first degree robbery defined at K.S.A. 21-527 subjecting him to the penalties therefor provided in K.S.A. 21-530.

2. On that date, on the basis of the complaint, a warrant for David Strange's arrest was issued. The defendant was arrested pursuant thereto and was brought before the Magistrate Court of Shawnee County, Kansas, for arraignment.

3. The Magistrate Court Judge thereupon formally arraigned the accused David Strange: the Court advised the accused of his right to counsel, his right to preliminary hearing, and his right to trial by jury. The Judge set bail at $5,000.00.

4. The accused advised the Court at that time that he was, through aid of sisters and brothers, contemplating arrangements for retention of counsel. The Court then continued the matter until July 10, 1969.

5. On July 10, 1969, the accused appeared before the Court without counsel. The accused indicated his need for counsel and his willingness to accept court-appointed counsel. The Court, upon interrogation, found the accused in need of counsel under the Sixth Amendment to the United States Constitution and further found the defendant without funds or any assets to employ counsel: the Court found the accused indigent.

6. On July 10, 1969, the Court appointed John E. Wilkinson to represent the accused in Case No. 69-CR-592 charging first degree robbery. On that same date at 4:30 p.m., the Court advised John E. Wilkinson that he had so been appointed counsel for David Strange.

7. On July 11, 1969, court-appointed counsel interviewed his client at the Shawnee County Jail.

8. On July 17, 1969, Case No. 69-CR-592 came before the Court. At that time, court-appointed counsel charged that the State of Kansas had lost jurisdiction to proceed against this accused because the accused had not been afforded any line-up meeting due process standards or otherwise and that failure to do so under the circumstances resulted in court-appointed counsel being unable to provide the accused with an adequate defense and a fair trial. Court-appointed counsel also asked the Magistrate Judge to find that bail in the amount of $5,000 was excessive; that setting bail in that amount deprived the accused of any opportunity to get any creditable witnesses for his defense. Court-appointed counsel then called to the attention of the Court the Aid to Indigent Defendants Act effective July 1, 1969, and asked the Court to grant authority for court-appointed counsel to consult with out of town relatives and other people by telephone and to incur expenses which in court-appointed counsel's mind would aid counsel in fully and fairly representing the accused. The Magistrate Court Judge ruled that expenditures made for long distance telephone calls not related to the defense of the specific charge could not be paid for out of the Aid to Indigent Defendants' Fund.

9. On July 24, 1969, the matter came up for hearing again on the motion of court-appointed counsel. The Court found that it had no authority or jurisdiction to compel law enforcement agencies to conduct a line-up. It further found that the failure to conduct a line-up did not constitute a violation of due process. The Court further found that bail should be reduced to an amount of $2,000 and held in abeyance any authorization for telephone communications out of state on the theory that the accused had not demonstrated the necessity and materiality.

10. Between July 24 and August 21, 1969, court-appointed counsel and the sister of defendant, Ualetta Singh, of St. Louis, Missouri, made every effort to try to work out something which would be in the best interest of the accused. Arrangements were made for enlistment into the armed forces. Then, at the last minute the Saline County Draft Board did in fact cause the defendant to be called for his pre-induction physical. In view of the fact that the accused was facing a first felony situation and in view of the fact that the Shawnee County District Court Judge was willing to grant an unconditional probation, court-appointed counsel and the accused appeared before the Magistrate Court Judge on August 19, 1969, at which time the complaint against the accused charging first degree robbery was amended to the charge of pocket picking as defined and set forth in K.S.A. 21-2422. At that time the defendant was bound over for trial to the District Court on the amended charge and bond fixed in the amount of $2,000.

11. On August 19, 1969, court-appointed counsel and the accused appeared before the Shawnee County District Court Judge William Randolph Carpenter. On that date a review of the proceedings held in the Magistrate Court was made. In addition the Shawnee County District Court Judge, after having interrogated the defendant under oath, found that "the defendant was indigent and was financially unable to employ counsel and pay other costs of his defense." The Court thereupon formally appointed John E. Wilkinson as David Strange's court-appointed counsel. At that time the matter was given No. 27038 in the Shawnee County District Court which charged a violation of K.S.A. 21-2422; that is, that the accused did *unlawfully, feloniously* and *willfully* take from the person of another certain personal property.

12. Also on August 19, 1969, the defendant entered his voluntary plea of guilty to the charge defined in K.S.A. 21-2422, and this plea of guilty was accepted by the Court.

13. On August 22, 1969, the matter came before the Court for sentencing. The defendant, through his court-appointed counsel, made application for probation. The Court, taking into consideration the attending circumstances, suspended imposition of sentence and placed the defendant on probation for a period of three years "without the usual conditions and without supervision for good cause shown."

14. The defendant passed his induction physical for the armed forces and awaited his call to be drafted.

15. David Strange commenced work while awaiting call for the draft and has been working steadily at a modest wage ever since being granted probation. He has also married. His wife is pregnant. A judgment rendered against the plaintiff could result in great hardship to the plaintiff, if the judgment was enforced.

16. Subsequent to being sentenced, the court-appointed counsel for the accused David Strange asked for the forms to submit for services rendered as court-appointed counsel. Court-appointed counsel received State of Kansas Department of Administration Accounts and Report Division Form DA-120/2 and while completing that form discovered the provisions of K.S.A. 62-3113, Sections (a) and (b) of the Indigent Defendants Act.

17. On August 29, 1969, court-appointed counsel wrote a letter to Judge Carpenter advising Judge Carpenter that he felt that K.S.A. 62-3113 was unconstitutional. Court-appointed counsel also advised Judge Carpenter that he had not advised the defendant that the state would be making an effort to recover any sum of money paid by the

state to his court-appointed counsel. The Courts—Magistrate Court and Shawnee County District Court—never advised nor did his counsel advise the defendant that the defendant may have a judgment rendered against him if he did not pay back to the state the money which would be paid by the state to his court-appointed counsel.

18. In December 1969 the state expended from the Indigent Defendants' Fund the sum of $500.00 to David Strange's court-appointed counsel, John E. Wilkinson.

19. On December 9, 1969, James R. James, pursuant to the provisions of K.S.A. 62-3113, sent to David Strange, by certified mail, notice requesting payment of the sum of $500.00 which had been expended for David Strange's expense as an indigent. The notice provided that he had until February 4, 1970, to pay $500.00 to the Supreme Court.

20. On January 30, 1970, complaint was filed in the United States District Court for the District of Kansas invoking the jurisdiction of a three-judge United States District Court under the provisions of 28 United States Code Annotated, Section 2281.

21. On February 2, 1970, a motion for temporary restraining order was entered ex parte by U. S. District Judge George Templar enjoining the Judicial Administrator from proceeding under the provisions of K.S.A. 62-3113.

22. Because of the lottery system recently enacted by the Congress of the United States, it appears now that the defendant will not be drafted into the armed forces. Consequently on December 22, 1969, the usual conditions of probation were imposed upon the defendant at that hearing. The assigned counsel asked the District Judge to enter an order not requiring the defendant to pay back the $500.00 expended to court-appointed counsel in David

Strange's defense. It was pointed out by court-appointed counsel that the defendant had committed his first felony offense, that he has a job working at night, that he has a wife, that his wife is expecting a child, and that to have a judgment in the amount of $500.00 entered against him at this time would be burdensome, annoying, harassing, and would result in his losing his job and result in his inability to care for himself and his wife.

23. The Shawnee County District Court Judge found that the motion to enjoin the Judicial Administrator from proceeding to judgment was not relevant to the proceedings at hand and that it would be inappropriate procedure for him to sustain such a motion at this point and time.

/s/ John E. Wilkinson
John E. Wilkinson
Attorney for David Strange, Plaintiff

/s/ Edward G. Collister Jr.
Edward G. Collister
For and on Behalf of the Attorney General for the State of Kansas and James R. James, Judicial Administrator, Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

DAVID E. STRANGE,
Plaintiff

vs.

JAMES R. JAMES, Judicial Administrator, and THE STATE OF KANSAS,
Defendants

Civil No. T-4713

ANSWER

(Filed March 20, 1970)

COME NOW the defendants and admit the allegations of the petition except as hereinafter specifically denied.

I.

Defendants deny that subsections (a) and (b) of K.S.A. 1969 Supp. 62-3113 are unconstitutional for reasons that they deprive plaintiff of his right to counsel as guaranteed to him by the sixth amendment to the United States Constitution or that K.S.A. 1969 Supp. 62-3113 is unconstitutional for any other reason.

WHEREFORE, defendants respectfully submit that the complaint is without merit and that all relief requested should be denied and the temporary restraining order which was granted should be dissolved.

Respectfully submitted,

Kent Frizzell
Attorney General
By /s/ Ernest C. Ballweg
Ernest C. Ballweg
Assistant Attorney General
Attorneys for Defendants.

CERTIFICATE OF PERSONAL SERVICE

I hereby certify that I personally delivered a true and correct copy of the foregoing *Answer* to JOHN E. WILKINSON, attorney for plaintiff, at the United States Courthouse, Federal Building, Topeka, Kansas, on the 20th day of March, 1970.

OPINION OF THE COURT

The opinion of the three-judge court is printed in the Jurisdictional Statement, pp. A1-A9.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

DAVID E. STRANGE,
Plaintiff,
vs.
JAMES R. JAMES, Judicial Administrator, and THE STATE OF KANSAS,
Defendants.
} **Civil No. T-4713**

JOURNAL ENTRY OF JUDGMENT

(Filed April 19, 1971)

On this 19th day of April, 1971, the above-captioned matter comes before a Three-Judge District Court of Circuit Judge Delmas C. Hill, District Judge George Templar, and District Judge Frank G. Theis. Plaintiff appears by his attorney, John E. Wilkinson, 708 First National Bank Building, Topeka, Kansas, and defendants appear by their attorney, Ernest C. Ballweg, Assistant Attorney General, Topeka, Kansas.

The Court finds that a Three-Judge District Court convened under the provisions of 28 United States Code § 2281,

et seq., has been duly impaneled to consider the constitutionality of K.S.A. 1970 Supp. 22-4513 (formerly codified as K.S.A. 62-3113, 1969 Supp.) and to enjoin its enforcement. The Court finds that Section 22-4513 unconstitutionally chills an indigent's exercise of his right to counsel guaranteed by the Sixth Amendment to the United States Constitution.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that K.S.A. 1970 Supp. 22-4513 is unconstitutional and that its enforcement should be permanently enjoined. Plaintiff is granted his cost including statutory attorney fees.

/s/ Delmas C. Hill
Delmas C. Hill
Circuit Judge
/s/ George Templar
George Templar
District Judge
/s/ Frank G. Theis
Frank G. Theis
District Judge

Approved:

/s/ John R. Martin
John R. Martin
Assistant Attorney General, representing James R. James for Vern Miller, Attorney General for the State of Kansas, and the State of Kansas.

/s/ John E. Wilkinson
John E. Wilkinson, of
Colmery, McClure, Funk & Hannah
708 First National Bank Building
Topeka, Kansas (66603) 232-0564
Attorney for Plaintiff.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

DAVID E. STRANGE,
Plaintiff,
vs.
JAMES R. JAMES, Judicial Administrator, and THE STATE OF KANSAS,
Defendants.

Civil No. T-4713

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed May 3, 1971)

I. Notice is hereby given that James R. James and the State of Kansas, defendants above-named, hereby appeal to the Supreme Court of the United States from the order declaring K.S.A. 1970 Supp. 22-4513 unconstitutional and enjoining its enforcement, entered March 5, 1971. This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all pleadings filed in this action.

III. The following question is presented by this appeal:

Whether the existence of a state statutory procedure providing for the collection from an indigent defendant of moneys expended by the State to furnish him counsel con-

stitutes an unlawful burden upon an indigent defendant's Sixth Amendment right to the assistance of counsel.

/s/ John R. Martin
John R. Martin
Assistant Attorney General
Attorney for the State of Kansas and James R. James, Judicial Administrator
Kansas Statehouse
Topeka, Kansas 66612

PROOF OF SERVICE

I, John R. Martin, one of the attorneys for the State of Kansas and James R. James, appellants herein, upon my oath, being of lawful age and duly sworn, do state that on the 5th day of April, 1971, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On David E. Strange, by mailing a copy thereof to John E. Wilkinson, Esq., at his office in the First National Bank Building, 6th and Kansas Avenue, Topeka, Kansas, in a duly addressed envelope, first class, postage prepaid.

Signed /s/ John R. Martin
John R. Martin
Assistant Attorney General
Attorney for the State of Kansas and James R. James, Judicial Administrator
Kansas Statehouse
Topeka, Kansas 66612

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Subscribed and sworn to before me, a Notary Public in and for said county and state, this 5th day of April, 1971.

/s/ Helen Maichel
Notary Public

(Seal)
My Commission Expires: July 11, 1971.

Supreme Court of the United States

No. 71-11 ----, October Term, 19

James R. James, Judicial Administrator, et al.,

Appellants,

v.

David E. Strange

APPEAL from the United States District Court for the District of Kansas.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-11

JAMES R. JAMES, Judicial Administrator, and
THE STATE OF KANSAS,
Appellants,

vs.

DAVID E. STRANGE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JURISDICTIONAL STATEMENT

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Topeka, Kansas 66612
Attorney for Appellants

Of Counsel:

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Attorney General of Kansas

EDWARD G. COLLISTER, JR.
Assistant Attorney General of Kansas

MATTHEW J. DOWD
Assistant Attorney General of Kansas
Statehouse

Topeka, Kansas 66612

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

JAMES R. JAMES, Judicial Administrator, and
THE STATE OF KANSAS,
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vs.

DAVID E. STRANGE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JURISDICTIONAL STATEMENT

INTRODUCTION

Appellants appeal from the judgment of the United States District Court for the District of Kansas, entered on April 19, 1971, enjoining the enforcement of K.S.A. 1970 Supp. 22-4513 upon the conclusion that said statute violates the constitutional right to counsel of indigent defendants protected by the Sixth and Fourteenth Amendments to the United States Constitution. This statement is submitted to support the conclusion that this Court has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the United States District Court for the District of Kansas is reported at 323 F.Supp. 1230 (1971). A copy of the opinion, containing the District Court's conclusions of law and judgment is attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

This suit was brought pursuant to 28 U.S.C. § 2281, to enjoin the enforcement, operation and execution of a statute of the State of Kansas, K.S.A. 1970 Supp. 22-4513, as being in conflict with the Sixth and Fourteenth Amendments of the Constitution of the United States. A judgment of a three-judge district court was entered on April 19, 1971, granting appellee Strange the relief he requested, declaring the above-referenced statute unconstitutional and enjoining its future enforcement. Notice of appeal was filed in the United States District Court for the District of Kansas on May 3, 1971.

Jurisdiction of this Court to review the decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U.S. 73, 75-77, 85 (1960); *Rorick* v. *Board of Commissioners of Everglades Drainage District*, 307 U.S. 208, 212 (1939); *Mayhue's Super Liquor Store, Inc.* v. *Meiklejohn*, 426 F.2d 142, 144-45 (5th Cir. 1970).

STATUTE INVOLVED

K.S.A. 1970 Supp. 22-4513, the validity of which was challenged in the district court reads as follows:

"(a) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by section 10 [62-3110], such defendant shall be liable to the state of Kansas for a sum equal to such expenditure, and such sum may be recovered from the defendant by the state of Kansas for the benefit of the fund to aid indigent defendants. Within thirty (30) days after such expenditure, the judicial administrator shall send a notice by certified mail to the person on whose behalf such expenditure was made, which notice shall state the amount of the expenditure and shall demand that the defendant pay said sum to the state of Kansas for the benefit of the fund to aid indigent defendants within sixty (60) days after receipt of such notice. The notice shall state that such sum became due on the date of the expenditure and the sum demanded will bear interest at six percent (6%) per annum from the due date until paid. Failure to receive any such notice shall not relieve the person to whom it is addressed from the payment of the sum claimed and any interest due thereon.

Should the sum demanded remain unpaid at the expiration of sixty (60) days after mailing the notice, the judicial administrator shall certify an abstract of the total amount of the unpaid demand and interest thereon to the clerk of the district court of the county in which counsel was appointed or the expenditure authorized by the court, and such clerk shall enter the total amount thereof on his judgment docket and said total amount, together with the interest thereon at the rate of six percent (6%) per annum, from the date of the expenditure thereof until paid, shall become a judgment in the same manner and to the same extent as any other judgment under the code of civil pro-

cedure and shall become a lien on real estate from and after the time of filing thereof. A transcript of said judgment may be filed in another county and become a lien upon real estate, located in such county, in the same manner as is provided in case of other judgments. Execution, garnishment, or other proceedings in aid of execution may issue within the county, or to any other county, on said judgment in like manner as on judgments under the code of civil procedure. None of the exemptions provided for in the code of civil procedure shall apply to any such judgment, but no such judgment shall be levied against a homestead. If execution shall not be sued out within five (5) years from the date of the entry of any such judgment, or if five (5) years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant and shall cease to operate as a lien on real estate of the judgment debtor. Such dormant judgment may be revived in like manner as dormant judgments under the code of civil procedure.

(b) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by section 10 [62-3110], a sum equal to such expenditure may be recovered by the state of Kansas for the benefit of the aid to indigent defendants fund from any persons to whom the indigent defendant shall have transferred any of his property without adequate monetary consideration after the commission of the alleged crime, to the extent of the value of such transfer, and such persons are hereby made liable to reimburse the state of Kansas for such expenditures with interest at six percent (6%) per annum. Any action to recover judgment for such expenditures shall be prosecuted by the attorney general, who may require the assistance of the county attorney of the county in which the action is to be filed, and such action shall be governed by the provisions

of the code of civil procedure relating to actions for the recovery of money. No action shall be brought against any person under the provisions of this section to recover for sums expended on behalf of an indigent defendant, unless such action shall have been filed within two (2) years after the date of the expenditure from the fund to aid indigent defendants."

QUESTION INVOLVED

1. Whether the existence of a state statutory procedure providing for the collection from an indigent defendant of moneys expended by the State to furnish him counsel constitutes an unlawful burden upon an indigent defendant's Sixth Amendment right to the assistance of counsel.

STATEMENT OF THE CASE

This case was presented to the three-judge court upon a stipulated statement of facts, set out in Document No. 8 of the record. Briefly, David Strange, a resident of Shawnee County, Kansas, was charged on July 2, 1969, with the felony offense of first degree robbery (in violation of K.S.A. 21-527) in the Magistrate Court of Shawnee County, Kansas. (Doc. # 8, ¶ 1) Mr. Strange was arrested on that date and brought before the Magistrate Court for arraignment. (Doc. # 8, ¶ 2) The Magistrate Court judge on that date advised Strange of his right to counsel, and then continued the matter until July 10, 1969, when Strange advised the Court that he was contemplating arrangements for the retention of counsel through the aid of sisters and brothers. (Doc. # 8, ¶ 3, 4) On July 10, 1969, the Magistrate Court found Strange indigent and at his request appointed counsel pursuant to state law. (Doc. # 8, ¶ 5) Thereafter, court-appointed counsel, John E. Wilkinson of Topeka,

Kansas, represented Strange during a criminal proceeding until, after being fully advised by counsel, Strange entered a plea of guilty to a reduced charge of unlawfully, feloniously and willfully taking from the person of another personal property in violation of K.S.A. 21-2422. (Doc. # 8, ¶ 11, 12) Mr. Strange was subsequently placed on probation on August 22, 1969, by the District Court of Shawnee County, Kansas. (Doc. # 8, ¶ 13)

Mr. Wilkinson, the court-appointed counsel for Mr. Strange, then submitted vouchers to the judicial administrator of the state of Kansas pursuant to the Kansas Aid to Indigent Defendants Act in order to secure compensation from the state for the duties performed. In December of 1969 the Indigent Defender's Fund, established by L. 1969, Ch. 291, paid $500 to Mr. Wilkinson for his representation of Strange in the state criminal proceeding pursuant to K.S.A. 1970 Supp. 22-4507.

On December 9, pursuant to K.S.A. 1970 Supp. 22-4513, the judicial administrator of the State of Kansas sent by certified mail a notice requesting payment of the sum of $500 by Mr. Strange. A judgment was not taken against Mr. Strange pursuant to the provisions of K.S.A. 1970 Supp. 22-4513 because a temporary restraining order, later replaced by a temporary injunction, was entered by the district court prohibiting the judicial administrator from further proceeding under the provisions of K.S.A. 22-4513. That injunction was made permanent by the district court's decision reflected in the Journal Entry of Judgment of April 19, 1971. The district court concluded that the provisions of K.S.A. 1970 Supp. 22-4513 had a "chilling" effect on the exercise of an indigent defendant's federal constitutional right to counsel provided by the Sixth and Fourteenth Amendments to the United States Constitution, and therefore declared the state statute unconstitutional and enjoined its further enforcement. This appeal followed.

THE QUESTION IS SUBSTANTIAL

The challenged state statute, K.S.A. 1970 Supp. 22-4513, is a portion of an "Aid to Indigent Defendants Act enacted by the 1969 Session of the Kansas Legislature. See L. 1969, Ch. 291, §§ 1-15. That act was adopted in an attempt by the Kansas Legislature to fully implement the requirements set out in this Court's decision of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and subsequent pronouncements on the subject of right to counsel for indigents. The State of Kansas had been one of those states which for many years had provided for the appointment of counsel in indigent cases. See G.S. 1868, Ch. 82, § 160; R.S. 1923, § 62-1304; L. 1941, Ch. 291, § 1; G.S. 1949, § 62-1304. The statutory scheme adopted by the 1970 Legislature provided for systematic compensation of the attorneys who were appointed in indigent cases (K.S.A. 1970 Supp. 22-4507), both at the trial and appellate level, as well as for compensation paid on behalf of the indigent defendants for procedural necessities such as transcripts and court documents (see K.S.A. 1970 Supp. 22-4505, 4506, 4509, or even such assistance as that provided by expert witnesses or investigators. (K.S.A. 1970 Supp. 22-4508) The "Act" attempted to provide guidelines whereby a Kansas examining court could determine the indigency of any defendant who stood before it. The particular portion of the "Act" in question here relates to legislative authorization for the state to attempt to recover back from those indigents on whose behalf money was expended, the sums so expended.

In connection with the expenditure of funds for attorney's fees in court appointment cases, a Board of Supervisors including, *inter alia*, the state judicial administrator and a representative of the state Supreme Court, was es-

tablished to review schedules for fee payment and approval of individual expense items. See K.S.A. 1970 Supp. 22-4514. Although the Board originally attempted to compensate court appointed lawyers at rates relatively close to local bar minimum, that was soon found to be impossible and rates were reduced to the point that currently they are approximately one-half of local bar minimum rates with a maximum of $500 per normal case. The monetary problem became so acute in Kansas that not only were the compensation rates for court appointed attorneys gradually reduced to the present level, but there was even the strong possibility during the 1971 Session of the Kansas Legislature that this type of expense would no longer be borne by the state.

The recovery of monies from persons on whose behalf defense expenses were paid was authorized and made enforceable in a number of ways by statute. See K.S.A. 22-4513. The opinion of the district court in this case made no distinction between the various methods of recoupment, but declared generally that any statute attempting to allow recovery of attorney's fees as does K.S.A. 22-4513 in any manner would violate an indigent defendant's right to counsel under the Sixth and Fourteenth Amendments.

The question thus presented is extremely important to the administration of the criminal justice system in the State of Kansas because the broad sweep of the district court's decision appears to prohibit any attempt to recover back from an indigent any money expended on his behalf, regardless of the manner or method by which that attempt is made. K.S.A. 22-4513, for example, allows a Kansas court in which a judgment against the former indigent defendant for recoupment exists to do such things for enforcement of the judgment as setting aside of conveyances of land prior to appointment of an attorney, or if

the judgment against the indigent defendant is kept alive under the Kansas dormant judgment and revival statutes (See K.S.A. 60-2403, 2404), to execute upon that judgment should the once indigent defendant suddenly find himself in possession of property. The district court's decision in this case has done more than declare K.S.A. 1970 Supp. 22-4513 unconstitutional as it is applied to Mr. Strange, it has made an across-the-board pronouncement that any attempt to recover back monies expended for attorney's fees is unconstitutional. The district court's opinion must conclude that any attempt on the part of any state in any way to recoup monies expended for the defense in an indigent case from the indigent defendant after the defense is completed in an unconstitutional impediment of the right to counsel. A determination of that issue will substantially affect the procedural administration of the right to counsel in a number of states, including Kansas. A number of states provide a procedure whereby monies expended on behalf of an indigent defendant can be recovered from that defendant at a later date. See Ala. Code, Title 15, § 318(12); Fla. Stat. Ann. (1971 Supp.) 27.56; N. J. Stat. Ann. (1971 Supp.) 2A: 158A-16; N.C. Stat. Ann. 7a-455(b); N.D. Cert. Code Ann. (1970 Supp.) 29-07-01.1; S.C. Code Ann. (1970 Supp.) § 19 17-283; Va. Code Ann. (1970 Supp.) § 14-1-184; W. Va. Code Ann. (1955) § 6190; Wisc. Stat. Ann. (1970 Supp.) § 256.66. See also Hawaii Rev. Stat. (1970 Supp.) § 611-6. Reimbursement is authorized under the federal Criminal Justice Act. See 18 U.S.C.A. § 3006A (f). Presumably, those methods, although the procedure involved in each varies from state to state, all are unconstitutional if the reasoning of the district court in this case is upheld. If the district court in this case is correct, in addition to that effect, the State of Kansas or any other state would be ill advised to attempt to find any way of recovering monies from indigent defendants after their defense is completed.

In the fiscal year 1970, in the State of Kansas alone, over six hundred thousand dollars ($600,000.00) was expended to compensate court-appointed attorneys and provide other defense expenditures. In many cases, the State of Kansas will not be able to recover any money from the person on whose behalf the expenditure is made. However, that does not mean that if the Legislature of the State of Kansas desires to adopt the policy of at least attempting to collect money where feasible, the state should not be allowed to do so insofar as the United States Constitution is not contravened.

The question presented herein is further substantial because the effect of the district court's decision in its broad sense with its broad-sweeping prohibition upon any attempt to recover monies expended on behalf of indigent defendants, is to encourage those who face criminal prosecution to place themselves in a position where they would be technically indigent under the indigent qualification statute (see K.S.A. 1970 Supp. 4504) for the purposes of their criminal trial, only to become more prosperous after that trial and the defense is completed. The effect of the district court's decision in this case is to say to those who are truly indigent, or who can make themselves become indigent temporarily, you receive free counsel at the expense of the State. This means the indigent defendant would automatically receive counsel and the state would have no opportunity to attempt to collect money back expended for counsel fees. The effect of the district court's decision in this case is to treat the indigent unequally. The district court has concluded that the effect of a Kansas statute is to place a chilling effect on the right to counsel. If in fact, either the fear of having to pay back the monies expended on your behalf, or the fear in the first place of having to raise money for defense does have a chilling effect, the decision in this case treats the in-

digent defendants among all other defendants in a far superior and unequal position. The State of Kansas is not asking that anyone's constitutional right to counsel be chilled. We think our Legislature has for years attempted to protect the constitutional rights of indigent defendants. However, we are asserting that once public monies are expended for individual persons, the state be allowed the opportunity to recover those monies in an appropriate case.

We make this request, keeping in mind the words of Mr. Justice Stewart, when he said for a majority of the Court:

> "We may assume that a State can validly provide for recoupment of the cost of appeals from those who later become financially able to pay." *Rinaldi* v. *Yeager*, 384 U.S. 305, 311 (1966).

We submit the question presented by this appeal is substantial, that this court does have jurisdiction to entertain this direct appeal, and on the merits that the decision of the District Court should be reversed.

Respectfully submitted,

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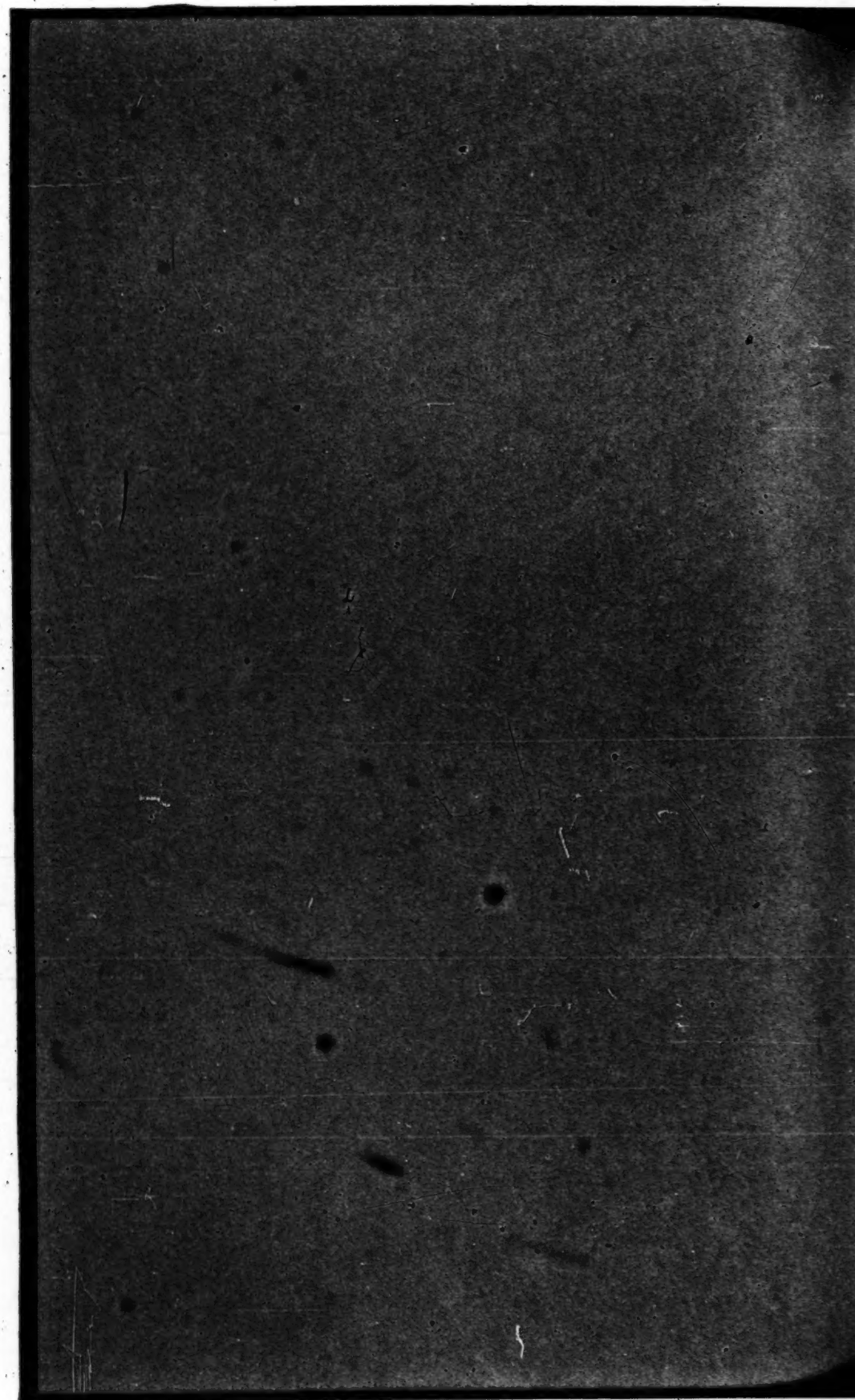

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DAVID E. STRANGE,
Plaintiff,
v.
JAMES R. JAMES, Judicial Administrator, and THE STATE OF KANSAS,
Defendants.

Civil No. T-4713

(Filed March 5, 1971)

John E. Wilkinson, Topeka, Kansas, for Plaintiff.

Ernest C. Ballweg, Assistant Attorney General, Topeka, Kansas, for Defendants.

Before HILL, United States Circuit Judge, TEMPLAR and THEIS, United States District Judges.

HILL, Circuit Judge.

Plaintiff, Strange, brings this action before a three-judge panel of the United States District Court and asks the court to declare K.S.A. 1970 Supp. 22-4513 unconstitutional and to enjoin its enforcement.[1]

The statute in question is a provision under the Kansas Aid to Indigent Defendants Act which, in brief, pro-

1. The Kansas Aid to Indigent Defendants Act, which includes the provision in question, has been recently recodified into K.S.A. 1970 Supp. 22-4501 through 22-4415. When plaintiff commenced this action, Section 22-4513 was codified as K.S.A. 62-3113 (1969 Supp.). Hereafter reference will be made to the 1970 recodification.

vides that whenever any state expenditure is made under the Act to provide counsel or other defense services to any indigent defendant, the defendant shall be liable to the State of Kansas for a sum equal to such expenditure, and such sum shall be recovered, if necessary, by entering the amount of the expenditure on the judgment docket as a judgment against the defendant.[2]

The procedural facts of the case are stipulated, and those material to our disposition are as follows: Plaintiff was arrested and charged with first degree robbery under Kansas law. At his arraignment before a magistrate, he advised that official of his attempt to retain counsel and the hearing was continued. Thereafter, plaintiff appeared before the magistrate and indicated his need for representation and his willingness to accept court appointed counsel. The magistrate found that plaintiff was without funds to employ counsel and did appoint counsel pursuant to the Aid to Indigent Defendants Act. Thereafter, plaintiff again appeared before the magistrate, with his court

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2. K.S.A. 1970 Supp. 22-4513 in pertinent part reads: "Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by Section 10, such defendant shall be liable to the state of Kansas for a sum equal to such expenditure, and such sum may be recovered from the defendant by the state of Kansas for the benefit of the fund to aid indigent defendants. * * *

"Should the sum demanded remain unpaid at the expiration of sixty (60) days after mailing the notice, . . . clerk shall enter the total amount thereof on his judgment docket and said total amount, together with the interest thereon at the rate of six per cent (6%) per annum, from the date of the expenditure thereof until paid, shall become a judgment in the same manner and to the same extent as any other judgment. . . . None of the exemptions provided for in the code of civil procedure shall apply to any such judgment, but no such judgment shall be levied against a homestead. * * *"

appointed counsel, and the original charge was reduced to the charge of pocket picking. Plaintiff was bound over to the Shawnee County District Court for trial and that court found the plaintiff to be financially unable to employ counsel and formally appointed counsel to represent plaintiff in that court. Plaintiff subsequently entered a voluntary plea of guilty which was accepted by the court, the imposition of sentence was suspended and plaintiff was placed on probation for a period of three years.

Thereafter, plaintiff's court appointed counsel made application for payment from the State Aid to Indigent Defendants Fund for services rendered. Then, for the first time, Section 22-4513 came to the attention of plaintiff and his court appointed counsel. The state paid $500 to plaintiff's court appointed counsel out of the fund, and pursuant to Section 22-4513 the Kansas Judicial Administrator requested plaintiff to reimburse the state within sixty days or a judgment in like amount would be docketed against plaintiff.

At the outset, we are confronted with defendants' motion to dismiss wherein defendants contend that plaintiff should assert his claim in a state court and that plaintiff will have the opportunity to present his claim to the state court when the state proceeds to enforce the judgment. We construe defendants' motion as a suggestion that this court abstain from deciding this case. However, on the authority of Zwickler v. Koota, 389 U.S. 241 (1967), we decline to abstain.[3] There is no lack of clarity in the state law and, as shall become apparent below, the statute is incapable of a narrowing construction which would render it constitutional.

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3. *Cf.* Reetz v. Bozanich, 397 U.S. 82 (1970).

Plaintiff's most appealing contention is that enforcement of Section 22-4513 infringes upon his right to assistance of counsel because the statute has a chilling effect on the exercise of the right to counsel. Conversely, the question may be put whether the continued viability of the decision in Gideon v. Wainwright, 372 U.S. 335 (1963), requires the state to provide free court appointed counsel to those accuseds who, like plaintiff, are financially unable to employ an attorney.

Beyond question, the Kansas statute deters indigents from exercising their right to the assistance of counsel. The statute most assuredly puts the accused in the position of deciding whether he can afford to consult even with court appointed counsel. In practical effect, this statutory condition on an indigent accused's acceptance of court appointed counsel returns the indigent accused to the lawyerless position he occupied prior to the decision in Gideon v. Wainwright, supra. For if an accused has not the means to hire an attorney in the first instance, he will not be in a position to accept court appointed counsel when it merely means that he has at most ninety days grace in paying the cost of legal services rendered on his behalf.

The Supreme Court of California has been confronted with essentially the same situation. In that state it was the practice, as a condition to probation, an indigent had to agree to repay the state for the cost of court appointed counsel. The California court held, In Re Allen, 455 P.2d 143 (Cal. 1969), that such a burden or condition upon the exercise of the right to counsel is unconstitutional. As was aptly stated on page 144 in that decision, "[W]e believe that as knowledge of this practice has grown and continues to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be . . . . This knowl-

edge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the court in *Gideon*, ... The government is without constitutional authority to impose a predetermined condition on the exercise of a constitutional right or penalize in some manner its use."

As was observed by the California court in Allen, supra, it is well settled that a statutory provision that conditions and thereby deters the exercise of constitutional rights may for that reason be unconstitutional, particularly when the hurdle that must be cleared to avail oneself of a fair criminal adjudication is financial and applies unevenly to indigents.[4] In United States v. Jackson, 390 U.S. 570 (1968), the Supreme Court considered the validity of a statute whose inevitable effect was to discourage assertion of the Fifth Amendment right not to plead guilty and to deter the exercise of the Sixth Amendment right to demand a jury trial. The court said, supra at 581-2: "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." And if the legislative objective is other than to deter the exercise of rights, the objective "[C]annot be pursued by means that needlessly chill the exercise of basic constitutional rights. The question is not whether the chilling effect is 'incidental' rather than 'intentional;' the question is whether the effect is unnecessary and therefore excessive."

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4. E.g. Rinaldi v. Yeager, 384 U.S. 305 (1966); Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963); Griffin v. Illinois, 351 U.S. 12 (1955).

We must conclude that Section 22-4513 is unnecessary and therefore excessive. What can be more unnecessary than trying to recoup costs of counsel from an individual already adjudged to be an indigent and by definition unable to stand the very expense in question? In this light it is apparent that the statute needlessly encourages indigents to do without counsel and consequently infringes on the right to counsel as explicated in Gideon v. Wainwright, supra.

Since we believe that the statute in its present form is a needless burden or condition on the exercise of a constitutional right, our attention now turns to whether the statute can be construed in any way to eliminate its chilling effect. In answer to this question, it appears that as long as the statute in any way requires the indigent to repay the state for legal services, the statute will remain as an unconstitutional burden to the exercise of constitutional rights, as those rights were laid out in Gideon v. Wainwright, supra.

Unquestionably the guiding principle behind the Gideon decision was, "The financial ability of the individual has no relationship to the scope of the [constitutional] rights [to counsel] involved here," Miranda v. Arizona, 384 U.S. 436, 472 (1966). It is safe to say that the right to counsel is absolute and should not be fettered by the poverty of the accused because, as was indicated in Miranda v. Arizona, supra, the right to counsel does not mean that a defendant can consult with a lawyer only if he has the funds to obtain one. To maintain unimpaired the concept embodied in the Gideon decision, it appears necessary that the state pay for the indigent's legal counsel when the defendant cannot afford the cost. Anything less appears to be an impermissible impediment to the exercise of a constitutional right.

An examination of the Gideon decision must begin with the Supreme Court's declaration that, "[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is *provided* for him."[5] Relying on that self-evident statement, the Supreme Court went on to hold that the Constitution requires that counsel must be provided in state trials for those accuseds too poor to provide their own counsel. Unquestionably the reasoning and decision in Gideon would be hollow verbiage if an indigent accused could be offered or "provided" counsel in such a way as to assure that he will reject court appointed counsel. But that is the effect of the Kansas statute when it extends counsel to an indigent accused under conditions making it unlikely that the accused will accept counsel.[6]

To this court, it is beyond question that the indigent's right to counsel as explicated in Gideon and the larger assurance of a fair trial implicit therein will not long endure unless the state provides counsel in a manner designed to assure that the indigent accused will in fact have counsel to represent him. Moreover, it is difficult if not impossible to see how the state can meet this obligation and at the same time provide for the recovery of legal expenses from indigents. Hence any construction of the Kansas statute which leaves intact the state's right to recover legal expenses from indigents is a construction which inevitably impinges upon and undermines the rights protected in Gideon.

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5. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (emphasis added).

6. "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." Miranda v. Arizona, 384 U.S. 436, 491 (1966).

There is no doubt that the holding in Gideon requires that an indigent defendant be provided counsel at the expense of the state. Mr. Justice Harlan, upon discussing another problem in his dissent to Desist v. United States, 364 U.S. 244, 268 (1968), capsulized Gideon as having "already established the proposition that the state must provide free counsel to indigents at the criminal trial." Numerous state high courts have extrapolated from the right to counsel the principle that an indigent is entitled to have counsel appointed to conduct his defense at the expense of the people.[7] The Supreme Court of New Hampshire squarely faced the problem we face here and struck down its statute on the authority of both the decisions of the United States Supreme Court and on the authority of the state constitution which, like the Sixth Amendment, provides for the absolute right to counsel.[8] Consequently, we believe that the inevitable effect of the Kansas statute which in anywise seeks to recover defense costs from indigents is to unconstitutionally burden and suppress the exercise of the constitutional right to counsel.

Defendants argue that the facts in this case do not disclose that plaintiff was deterred from accepting court appointed counsel insofar as plaintiff actually did accept court appointed counsel. However, whether the accused in this case accepted or rejected counsel does not remove the fact that the provision for recovering legal expenses is a burden and condition on the exercise of the right to counsel and thereby has some chilling effect on the exercise of the right. The defendants also contend that the

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7. E.g. Anderson v. State, 239 A.2d 579 (Md. 1968); People v. LeMarr, 136 N.W.2d 708 (Mich. 1965); State v. Holiday, 155 N.W.2d 378 (Neb. 1967); State v. Rush, 217 A.2d 441 (N.J. 1966); Commonwealth v. Johnson, 236 A.2d 805 (Pa. 1968).

8. Opinion of the Justices, 256 A.2d 500 (N.H. 1969).

Kansas statute has a parallel in the Criminal Justice Act, 18 U.S.C. §3006A(f). Even if this is an accurate appraisal of the Federal statute, it is not relevant since we are not called upon to consider the validity of the Criminal Justice Act.

Finally, defendants' analogy between the recovery of appointed counsel's fee and the state's permissible recovery of the costs of a criminal prosecution fails because regarding the state's permissible recovery of the latter costs, there is no constitutional right analogous to the right to counsel which is infringed.

We conclude that K.S.A. 1970 Supp. 22-4513 is unconstitutional and an injunction will issue against its enforcement.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-11

JAMES R. JAMES, Judicial Administrator, and
THE STATE OF KANSAS,
Appellants,

vs.

DAVID E. STRANGE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

APPELLEE'S MOTION TO DISMISS APPELLANTS' APPEAL AND TO AFFIRM THE DECISION AND JUDGMENT OF THE THREE-JUDGE DISTRICT COURT

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The question presented by this appeal has been in effect previously decided by this Court. The States have the responsibility (or burden) to furnish counsel to an accused, just as they have the responsibility (or burden) to furnish an agency to prosecute alleged law violators.

INTRODUCTION

On September 24, 1971, Counsel for appellee received a letter from the U. S. Supreme Court Clerk's Office dated September 20, 1971 requesting that counsel for appellee-plaintiff file a response to the Jurisdictional Statement of appellants which statement is a part of an appeal filed and docketed in the U. S. Supreme Court on July 1, 1971.

Appellants are appealing from the decision and judgment of the Three-Judge District Court which did on April 19, 1971 enjoin the enforcement of K.S.A. 1970 Supp. 22-4513 due to the plain fact that said statute violated a basic federally guaranteed right to counsel. The Court found, as a matter of fact, that Section 22-4513 is unnecessary and therefore excessive and thus needlessly encourages indigents to do without counsel and consequently infringes on the right to counsel.

BACKGROUND STATEMENT

Appellee's counsel has reviewed appellants' Jurisdictional Statement; there is no quarrel with what is stated, for the most part, in the sections denominated *Introduction, Opinion Below, Jurisdictional Statement* (again), *Statute Involved,* or *Question Involved.*

However, on page 6, appellants state that appellee—the accused in Shawnee County District Court—entered a plea of guilty to violating certain statutes, "*after being fully advised by counsel*". This is simply not the case. On page A1 of the Appendix, the opinion of Circuit Judge Delmas C. Hill is set out. At page A3, Judge Hill states that K.S.A. 1970 Supp. 22-4513 did not come to the attention

of plaintiff and his court-appointed counsel until after the plea of guilty and after a considerable amount of legal service was rendered to this defendant. The Shawnee County Magistrate Judge, the Shawnee County District Court Judge, and his court-appointed counsel never advised the accused of the ramifications of accepting court-appointed counsel. When counsel for appellee prepared his application for payment from the State Aid to Indigent Defendants Fund, he discovered that the accused—then parolee—was going to have a judgment against him for the legal services rendered in an amount over which the accused had no control.

At that point of time, court-appointed counsel decided to proceed to collect a fee from the State and decided to contest the constitutionality of the statute which allowed the State to procure a judgment against the accused.

In the Three-Judge District Court proceedings, the points raised were:

1. Did the Magistrate Court of Shawnee County, Kansas and the District Court of Shawnee County, Kansas fail to give this plaintiff "due process" notice of the effect that acceptance of court-appointed counsel would have—that a judgment would be rendered against plaintiff for whatever sum the State would pay his court-appointed counsel?

   (a) What constitutes "due process" notice? (See *Sniadach* v *Family Finance Corporation*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349.)

   (b) Does failure to give notice render any proposed judgment void?

2. If due process notice had been afforded this plaintiff in the State Court proceedings—that is, notice that the plaintiff's acceptance of court-appointed counsel would result in a judgment against him for an undetermined amount—could the statute operate

in such a way as to not result in a denial to this plaintiff of the equal protection of the laws as guaranteed by the Fourteenth Amendment as equal protection relates to the free exercise of a right guaranteed by the Sixth Amendment to the United States Constitution?

(a) Would acceptance of court-appointed counsel deny the indigent accused of equal protection of the law?

(b) Would a refusal to accept court-appointed counsel deny the indigent accused of equal protection of the law?

Now, even though it was admitted that no notice or hearing was held on the effect of accepting court-appointed counsel, the Three-Judge District Court wanted to meet the problem of whether or not the statute could be made to function constitutionally: at least one other case asking for a Three-Judge District Court was filed in Wichita, others were being prepared. Since this case was filed, briefed and argued (in near record time) the Three-Judge District Court, in the interest of conserving judicial time, proceeded as if due process notice had been afforded this plaintiff-appellee—in the State Court proceedings.

ARGUMENT AND AUTHORITIES

The State in its Jurisdictional Statement is tenuous. It's difficult to follow and to understand for those of us who are equalitarians. At page 10, it is stated, ". . . The effect of the District Court's decision in this case is to treat the indigent unequally. . . .

. . . the decision in this case treats the indigent defendants among all other defendants in a far superior and unequal position."

One has to abandon his oath to uphold the constitution to be persuaded by such statements. We all pay taxes in some form or another to run our various branches of government: our Congress, our President, our Judiciary, our Legislatures, our Governors, our Local Courts, agencies of all kinds. These federal, state and local governments are designed to be efficient in affording each and every one of us equal protection of the law, due process of law, freedom of the press, freedom of speech, freedom to worship as we please, freedom from unreasonable searches of our person and unreasonable seizures of our personal effects. Our governments, fundamentally, justify their existence by insuring each and every one of us basic rights—the right against self-incrimination, the right to confront our accusers, the right to cross-examine our accusers, the right to subpoena witnesses on our own behalf, the right to a jury trial, and the right to have the same variety of effective counsel as a rich man would have. As long as our governments do this—our great American experiment has hope—democracy will be in action.

But the struggle for basic human rights is continual. It never ends. There is a feeling on the part of some that

the poor and the oppressed must not be given hope, must not be given faith, must not be given charity. The problem for those people is that our populace, for the most part, even though in a dependent state, has become educated: educated to basic rights. We must uphold the dignity of man: the country will be fraught with turmoil as long as basic rights are defeated by subtle provisions of law, such as we have before the court in the instant situation. We must not allow the poor and the unfortunate to drown on the Constitutional Rights plank—the very plank by which they saved themselves.

The Appellants' whole argument relates to a different standard than the one required to be used. In *Griffin* v *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), the majority held that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (351 U.S. at 19.) The standard must relate to the rich man. The appellee-plaintiff here was and is an indigent. He was an indigent at the time of his arrest, he was an indigent at the time counsel was appointed for him, and he remains an indigent today. As pointed out by Mr. Justice Douglas in *Douglas* v. *California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 2d 811 (1963):

> "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, or the indigent already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent where the record is unclear or the errors are hidden, has only the right to a meaningless appeal." (372 U.S. at 358.)

Again, Courts must be bastions of freedom; not fraught with subtle ways to prevent the exercise of basic rights.

If the State's theory is correct, the indigent would have to consider several matters in making a decision as to whether to accept court-appointed counsel. One matter would be whether he wanted to subject himself to a judgment, in and of itself. Another matter would be the amount of the judgment and interest thereon. But more basically, he would have to decide whether he really wanted a jury trial, whether he really wanted to testify, whether he really wanted to confront the witnesses accusing him, whether he really wanted to cross-examine those witnesses, whether he really wanted to subpoena witnesses on his own behalf, whether he really wanted to contest the validity of his arrest and whether he really wanted to avail himself of other constitutional rights. To get right to the point, he would have to determine whether he really wanted counsel.

In *Gideon* v. *Wainwright*, (1963) 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed. 2d 799, the United States Supreme Court stated that not only certain precedents, to which it alluded, but

> "also reason and reflection require us to recognize that in our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

Whether the accused *accepted* court-appointed counsel or whether he *refused* court-appointed counsel is immaterial. The plain fact is the statute is an impediment to his right to counsel. It imposes upon him matters which he should not be concerned about in the circumstances in which he finds himself. To allow the statute to operate would deny him equal justice or equal protection of the law. The U. S. Supreme Court has repeatedly said that a poor man is entitled to the same privileges in court as is a rich man. See *Griffin* v *Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Douglas* v *People of the State of California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 2d 811 (1963); *Lane* v *Brown,* 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed. 2d 892 (1963); *Draper* v *Washington,* 371 U.S. 487, 83 S.Ct. 774, 9 L.Ed. 2d 889 (1963); *Rinaldi* v *Yeager,* 384 U.S. 305, 86 S.Ct. 1497, 17 L.Ed. 2d 577 (1966); *Williams* v *Oklahoma City,* 395 U.S. 458, 89 S.Ct. 1918, 23 L.Ed. 2d 440 (1969).

However, a case most directly in point to our situation at hand is *In re Allen,* 78 Cal. Rptr. 207, 455 P.2d 143 (1969). In that case a defendant, Allen, pled guilty in the Superior Court of San Mateo, California, to the offense of possessing a restricted dangerous drug without prescription. The defendant's sentence was suspended and she was placed on probation. One of the conditions of the defendant's probations was that she "reimburse the County of San Mateo

for court-appointed counsel through the probation department." This condition of probation was imposed apparently pursuant to a clause in the California Penal Code which provided that a court may impose any "reasonable conditions it may determine are fitting and proper to the end that justice may be done. . ."

Subsequently the defendant applied for a writ of habeas corpus challenging the requirement of reimbursement condition in her probation. The Supreme Court of California unanimously ruled that this condition of the defendant's probation was invalid. In its opinion the Court held that a condition of probation requiring reimbursement for a court-appointed counsel "constitutes an impediment to the free exercise of a right granted by the Sixth Amendment." The Court pointed out at Page 144:

> "We may take judicial notice that judges in San Mateo County and in certain other counties have made use of the method utilized in the case at hand of reimbursing the county's treasury for funds expended in supplying counsel for indigents. Although this concern for the financial burden imposed upon the counties for such costs is commendable we believe that as knowledge of this practice has grown and continues to grow, many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the court in *Gideon*, supra. Although in the instant case there is no indication in the record that petitioner was discouraged from exercising her constitutional right to counsel for, in fact, she requested and received counsel, neither does the record show that she was forewarned of the possibility

that she might become indebted to the county for the cost of such service. The fact that such knowledge might have deterred her, and could well deter others, gives rise to our concern as to the validity of such a condition of probation. The government is without constitutional authority to impose a predetermined condition on the exercise of a constitutional right or penalize in some manner its use."

The Court also noted that since a defendant would not normally have any part in setting the amount to be reimbursed the "blank check" approach authorized by allowing reimbursement to be a condition of probation might further detain defendant's acceptance of appointment of counsel. The Court concluded that authorizing the meeting of deficits in court and county justice by making probation of defendant a source of revenue may well "divert or dilute the attention the judge must give to the specific considerations which the law requires him to have in mind in the sentencing process."

In the case before us, we do not have the problem of making a reasonable classification among the various people that are accused with crime. This statute applies to any and all people whether the accused is convicted, whether the matter is dismissed, or whether he pleads guilty. This fact simplifies our problem. That means that there is no need for the State to interpret this statute. It means that the only matter to be considered is whether the application of the statute in some way infringes upon the accused's federally guaranteed rights. It leaves only the federal question to be considered.

K.S.A. 1970 Supp. 22-4513 (b) cannot operate in such a manner as to not result in the denial to this plaintiff of the equal protection of the laws. As stated in *Allen*, supra,

"It would appear utterly inconsistent to advise a defendant of his entitlement of the free service of coun-

sel and later to exact repayment through the medium of a condition of probation."

Miranda v *Arizona,* (1966) 384 U.S. 436, 86 S.Ct. 1602, 17 L.Ed. 2d 694, makes clear that where

> "rights secured by the constitution are involved, there can be no rule making or legislation which would abrogate them." (p. 499)

K.S.A. 1970 Supp. 22-4513 abrogated the free exercise of the right of the accused guaranteed by the Sixth Amendment of the United States Constitution.

In the *Opinion of the Justices, No. 5978,* 256 A.2d 500 (1969), the Supreme Court of the State of New Hampshire considered a proposed provision in the New Hampshire law making indigent defendant personally responsible for the payment of ten percent of the legal fees paid court-appointed counsel: such persons were to pay a minimum of $5.00 but were not responsible for payment in excess of $20.00. The Court held the law invalid: payment of counsel should be made without reference to it. The New Hampshire justices observed "it doesn't seem illogical that a defendant who has or acquires the ability to pay his attorney should do so, but that the difficulty lies in making such reimbursement provisions in such a manner that does not violate constitutional requirements". (page 502) The justices cited *Rinaldi* v *Yeager,* supra, and *In re Allen,* supra.

A law review comment entitled "Reimbursement of Defense Costs as a Condition of Probation for Indigents", 67 Mich. L. Rev. 1404 (1969), is in accord with the contentions advanced by the plaintiff-appellee. At page 1413 the writer points out exactly what the problem is: if convicted indigents are required to reimburse the state for the cost of their defense they may choose to forego

counsel and other legal assistance in the first instance in order to avoid the potential burden of repayment. The writer observed that "such a requirement exerts what the Supreme Court has characterized, in other contexts, as a 'chilling effect' on the defendant's freedom to exercise his constitutional rights". The writer draws a parallel to the proposition before the United States Supreme Court in *U. S.* v *Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 2d 138 (1968). There the Court held unconstitutional the section of the federal kidnapping act which provided that the death penalty for kidnapping could be imposed only by a jury verdict. The writer said:

> "Since a defendant faced the possibility of death with a jury trial but not with a trial before a judge, the Court found that the statute violated the due process clause of the Fifth Amendment because it discouraged unnecessarily the defendant's exercise of the Sixth Amendment right to trial by jury and his Fifth Amendment right to plead not guilty. Similarly the requirement that an indigent defendant reimburse the State for the cost of his defense exerts a chilling effect on the exercise of his constitutional rights." (See page 1413.)

The State makes reference to *Rinaldi* v. *Yeager*, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed. 2d 577 (1966). From the beginning I have cited this case for two reasons: (1) the procedure invoked therein; and (2) the actual holding struck down the requirement of recoupment on the cost of a transcript on the grounds that such requirement denied one of equal protection. Mr. Justice Potter Stewart made some statements dealing with equal protection as that clause relates to reasonable classifications. Mr. Stewart made no statements anywhere, in my opinion, dealing with the unfettered right to counsel as that issue was settled March 20, 1963 in *Gideon*. In the *Rinaldi*

case, the Court was dealing with, again, unreasonable classification; we are dealing here with the exercise of a basic right of a person charged with a serious crime.

The sanctity or inviolability of the Sixth Amendment as it relates to serious offenses was not exactly fast in coming. Now, after *Gideon*, we the people can say that we have a federally guaranteed right to counsel whether we are charged in State or Federal Court.

One must remember that there is no contest pertaining to the Court's finding of indigency. Appellants' argument speculates about transfer of property to acquire a status of indigency: there are ways of dealing with such problems if they arise. In the instant case, David Strange has made good on his probation but has had a marginal existence. There has never been a time where I've felt that the public interest would have been served or that he would have been better served by having him subjected to a judgment. The money spent in acquiring and levying on judgments against indigents would be better spent on a thousand and one other things—rehabilitation, schooling, better defense, better prosecution, and other priorities.

MOTION

For all of the foregoing reasons, appellee hereby motions this Court to dismiss appellants' appeal and to affirm the decision and judgment of the Three-Judge District Court.

Respectfully submitted,

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Court-Appointed Attorney for David E. Strange

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-11

JAMES R. JAMES, Judicial Administrator,
State of Kansas,
Appellant,

vs.

DAVID E. STRANGE,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

OPINION BELOW

The opinion of the three-judge district court is set out in the appendix to the jurisdictional statement, A1-A9, and is reported in 323 F. Supp. 1230 (D. Kan. 1971).

JURISDICTION

The opinion of the three-judge court was filed on March 5, 1971. Judgment pursuant to the opinion was entered on April 19, 1971. That judgment declared, *inter alia*, K.S.A. 1971 Supp. 22-4513 unconstitutional and permanently enjoined future enforcement of the statute. Notice of appeal was filed in the United States District Court for the District of Kansas on May 3, 1971. An order noting probable jurisdiction was entered by this Court on December 7, 1971. Appellate jurisdiction is conferred by 28 U.S.C. §§ 1253 and 2101(b).

QUESTION INVOLVED

Whether the existence of a state statutory procedure providing for the collection from an indigent defendant of moneys expended by the state to furnish him counsel, constitutes an unlawful burden upon an indigent defendant's Sixth Amendment right to the assistance of counsel.

STATUTE INVOLVED

K.S.A. 1971 Supp. 22-4513, the validity of which was challenged in the district court reads as follows:

> "(a) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by section 10 [62-3110], such defendant shall be liable to the state of Kansas for a sum equal to such expenditure and such sum may be recovered from the defendant by the state of Kansas for the benefit of the fund to aid indigent defendants. Within thirty (30) days after such expenditure, the judicial administrator shall send a notice by certified mail to the person on whose behalf such expenditure was made,

which notice shall state the amount of the expenditure and shall demand that the defendant pay said sum to the state of Kansas for the benefit of the fund to aid indigent defendants within sixty (60) days after receipt of such notice. The notice shall state that such sum became due on the date of the expenditure and the sum demanded will bear interest at six percent (6%) per annum from the due date until paid. Failure to receive any such notice shall not relieve the person to whom it is addressed from the payment of the sum claimed and any interest due thereon.

Should the sum demanded remain unpaid at the expiration of sixty (60) days after mailing the notice, the judicial administrator shall certify an abstract of the total amount of the unpaid demand and interest thereon to the clerk of the district court of the county in which counsel was appointed or the expenditure authorized by the court, and such clerk shall enter the total amount thereof on his judgment docket and said total amount, together with the interest thereon at the rate of six percent (6%) per annum, from the date of the expenditure thereof until paid, shall become a judgment in the same manner and to the same extent as any other judgment under the code of civil procedure and shall become a lien on real estate from and after the time of filing thereof. A transcript of said judgment may be filed in another county and become a lien upon real estate, located in such county, in the same manner as is provided in case of other judgments. Execution, garnishment, or other proceedings in aid of execution may issue within the county, or to any other county, on said judgment in like manner as on judgments under the code of civil procedure. None of the exemptions provided for in the code of civil procedure shall apply to any such judgment, but

no such judgment shall be levied against a homestead. If execution shall not be sued out within five (5) years from the date of the entry of any such judgment, or if five (5) years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant and shall cease to operate as a lien on real estate of the judgment debtor. Such dormant judgment may be revived in like manner as dormant judgments under the code of civil procedure.

(b) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by section 10 [62-3110], a sum equal to such expenditure may be recovered by the state of Kansas for the benefit of the aid to indigent defendants fund from any persons to whom the indigent defendant shall have transferred any of his property without adequate monetary consideration after the commission of the alleged crime, to the extent of the value of such transfer, and such persons are hereby made liable to reimburse the state of Kansas for such expenditures with interest at six percent (6%) per annum. Any action to recover judgment for such expenditures shall be prosecuted by the attorney general, who may require the assistance of the county attorney of the county in which the action is to be filed, and such action shall be governed by the provisions of the code of civil procedure relating to actions for the recovery of money. No action shall be brought against any person under the provisions of this section to recover for sums expended on behalf of an indigent defendant, unless such action shall have been filed within two (2) years after the date of the expenditure from the fund to aid indigent defendants."

STATEMENT OF THE CASE

This case involved a challenge to the constitutionality of a state statute, K.S.A. 1971 Supp. 22-4513, which provided a method whereby the state of Kansas could recover in civil proceedings moneys expended for legal services on behalf of indigent defendants subsequent to the rendition of services. The case was heard by a three-judge court of the District of Kansas upon a stipulated statement of facts, which really were irrelevant to the court's decision, and generally indicated that David Strange was charged with a felony criminal offense in the District Court of Shawnee County, Kansas, on July 2, 1969. (A. 7) Mr. Strange was arrested, brought before the magistrate court for arraignment, advised of his right to counsel, subsequently found indigent, provided appointed counsel pursuant to state law, entered a plea of guilty to a reduced charge, and placed on probation by the District Court of Shawnee County, Kansas. (A. 7, 9, 10)

Pursuant to state statute, the procedure for payment of the attorney's services commenced. Vouchers were submitted to the judicial administrator of the state of Kansas pursuant to the Kansas Aid to Indigent Defendants Act. (Mr. James at all times relevant to this lawsuit has been judicial administrator of the state of Kansas and responsible for administrative enforcement of the Aid to Indigent Defendants Act.) Mr. Strange's court-appointed counsel was paid $500. (A. 11) Subsequently, pursuant to K.S.A. 1971 Supp. 22-4513, the judicial administrator sent notice by certified mail requesting payment of the sum of $500 to Mr. Strange. The administrative procedure concerning reimbursement to the state did not proceed any further because a temporary restraining order, later replaced by a temporary injunction, was entered by the Court prohibiting the judicial administrator from proceeding further.

That injunction was made permanent by the three-judge court's decision reflected in the Journal Entry of Judgement of April 19, 1971. (A. 14-15) The Court concluded that the provisions of K.S.A. 1971 Supp. 22-4513 unnecessarily and needlessly burdened an indigent's federal constitutional right to counsel guaranteed by the Sixth and Fourteenth Amendments and therefore declared the state statute unconstitutional enjoining its future enforcement. This appeal followed.

ARGUMENT AND AUTHORITIES

A State May Constitutionally Provide for Recoupment from an Indigent Defendant of Monies Expended by the State to Furnish Appointed Counsel to the Indigent

This appeal involves the constitutionality of a portion of the Kansas "Aid to Indigent Defendants Act" enacted by the 1969 Session of the Kansas Legislature. The challenged portion of the Act, K.S.A. 1971 Supp. 22-4513, allows the state of Kansas to recover costs incurred in providing counsel and other services to indigent defendants, from those defendants subsequent to the expenditure. The statute authorizes, *inter alia*, the following:

1. The state may take a judgment in the same manner and to the same extent as any judgment under the Code of Civil Procedure (22-4513 (a)).

2. The judgment becomes a lien on any real estate after its existence (22-4513 (a)).

3. Execution, garnishment or other proceedings in aid of execution may be utilized to enforce the judgment as in any judgment under the civil procedure code (22-4513 (a)).

The statute also limits the real estate liens by recognizing the homestead exemption. The statute provides that the

judgment will become dormant in five (5) years if execution is not issued. For all practical purposes the methods available for enforcement of the judgment are the same as those provided by the Code of Civil Procedures or any other civil judgment. See K.S.A. 1971 Supp. 60-701-724, 60-2401-2419.

The statute also provides that a recovery may be had against persons to whom the indigent defendant has transferred property subsequent to the commission of a crime without adequate monetary consideration, to the extent of the value of such transfer (22-4513 (b)). Such an action must be brought within two (2) years afer expenditure from the fund.

The three-judge court declared the statute unconstitutional on its face, after reaching conclusions that under no possible factual situation, nor under any possible interpretation of the statute, could it be found constitutional. The basis of the three-judge court's decision was that any construction,

> ". . . of the Kansas statute which leaves intact the state's right to recover legal expenses from indigents is a construction which inevitably impinges upon and undermines the rights protected in Gideon." *Strange v. James*, 323 F. Supp. 1230, 1234 (D. Kan. 1971), jurisdictional statement, A. 7.

The breadth of the three-judge court's decision requires a conclusion that any statute, or any interpretation of this particular statute, which allows the state of Kansas under any circumstances to recover legal expenses from indigents unconstitutionally impairs the right to counsel.

The historical background of Kansas right to counsel law is illuminating. The legislature of the state of Kansas has for many years been concerned with, and attempted

to protect, rights granted by the Sixth Amendment to the Federal Constitution. Since 1868, there have been statutory provisions in Kansas requiring the state to provide counsel in some criminal cases for those who are financially unable to secure counsel of their own choosing. See Kan. G. S. 1868, Ch. 82, § 160; R.S. 1923, § 62-1304; L. 1941, Ch. 291, Sec. 1; Kan. G. S. 1949, Sec. 62-1304. With the increase in the volume of criminal cases, and the expansion of the stages of the criminal prosecution to which the right to counsel applied, the legislature codified a detailed procedure to be followed for appointment and use of attorneys in indigent cases in 1969. The statutory scheme adopted by the 1969 legislature provided for systematic compensation of the attorneys who are appointed in indigent cases (K.S.A. 1970 Supp. 22-4507), both at the trial and appellate level, as well as for compensation paid on behalf of the indigent defendants for procedural necessities such as transcripts and court documents (K.S.A. 1971 Supp. 22-4505, 4506, 4509), or such assistance as that provided by expert witnesses or investigators (K.S.A. 1971 Supp. 22-4508). Legislative guidelines established a procedure for determining the indigency of any defendant who stood before a Kansas court. The legislation also set up guidelines for the expenditure for funds for attorney's fees in appointment cases. A board of supervisors, including as members the state judicial administrator and a representative of the state supreme court, was established to review schedules for fee payment and approval of individual expense items. See K.S.A. 1971 Supp. 22-4514. In addition, the challenged portion of the legislation authorized the state to attempt to collect expenditures from those on whose behalf the expenditure was made subsequent to the time the expenditure was made.

The state of Kansas, not unlike many other states, has in the past five years been suffering severe revenue

problems. As a result of revenue concern, provision for recovery of expenditures was included in the Indigent Defendants Act. The money problems with respect to court-appointed attorneys is reflected in appropriations made over the last three years. In 1969, the Legislature appropriated $376,500 to fund the Aid to Indigent Defendants Fund. L. 1969, Ch. 46, Sec. 13. The 1970 appropriation totaled $350,000. L. 1970, Ch. 25, Sec. 4, Ch. 44, Sec. 3. By 1971, when use of the Fund became extensive, the inadequacy of the previous funding was obvious. It was necessary for the 1971 legislature to make a supplemental appropriation of $275,000.00 for fiscal year 1970. L. 1971, Ch. 12, Sec. 54(a). For fiscal 1972, the judicial administrator requested that his total 1971 budget ($570,000) be increased to $612,000. However, the Legislature appropriated less money, after a serious attempt to do away with the funding program entirely. Ultimately, $400,000 was appropriated for fiscal 1971 to fund the program. L. 1971, Ch. 13, Sec. 52(a); see also L. 1971, H.J. 715, S.J. 569.

During fiscal 1970, the judicial administrator expended almost all of the original appropriation. In fiscal 1971, both the original and supplemental appropriations were expended. The result currently is that the judicial administrator has had to reduce on a pro rata basis payments made to attorneys in view of the reduced appropriations. Currently, the Board of Supervisors of the Indigent fund has set compensable services at the value of $15 an hour for out-of-court time and $20 an hour for in-court time for attorney's fees compensable under the Act. This figure is roughly fifty to sixty percent of recommended minimum fee charges in the metropolitan areas in Kansas and slightly below the recommended minimum fee schedules in the rural areas. The figures are also roughly fifty percent of the payment schedule currently used in the federal court for appointed counsel. Thus, in many cases,

the value of the same services as far as monetary exchange is concerned is lower in appointment cases, than it would be if the attorney is retained. In Kansas there is also a maximum limitation of $500 on the amount payable in any case not involving a class A felony. Class A felony cases are those where possible punishment is either death or life imprisonment. There is a maximum limitation of $6,000 per case for defense in class A felony cases.

Through fiscal years 1970 and 1971, approximately $17,000 has been recovered by use of the challenged statute. Since the state is currently enjoined from utilizing the recovery procedures, there has been little or no follow up action to enforce the provisions of the statute during the entirety of its existence.

A survey of other jurisdictions, including the federal system, discloses the reimbursement provision of the Kansas law neither unique, nor unusual. Ala. Code, Title 17, § 318(12) (1969 Supp.); Alaska Stat. Ann. 1962 § 12.55-020; Fla. Stat. Ann. § 27.56 (1971 Supp.); Hawaii Rev. Stat. § 611-6 (1970 Supp.); Idaho Code Ann. § 19-858 (1971 Supp.); Ind. Ann. Stat. 1956, 9-3501 (1971 Supp.); Iowa Code Ann. § 775.5 (1971 Supp.); Md. Code 1966, Art. 26, § 9; N.H. Rev. Stat. Ann. 604-A:9 (1971 Supp.); N.D. C.C., § 29-07-01.1; N.M. Stat. Ann., 1953, § 41-22-7; Ohio R.C. § 2941-51 (1970 Supp.); Ore. Rev. Stat. § 137.205; S.C. Code 1962, § 17-283 (1971 Supp.); 2 Tex. C.C.P., Art. 26.05 §§ 3, 5; Tex. C.C.P., Art. 1018; Va. Code Ann. § 14.1-184 (1971 Supp.); W. Va. Code Ann. (1955) § 6190; 29 Wis. Stat. Ann. § 256.66. See also 18 U.S.C. Section 3006 A (f).

The sole issue presented is whether or not the State of Kansas may, if its Legislature so decides, enact a statute providing a procedure for collection of expenses, including attorney's fees, from those persons determined indigent on whose behalf such funds were provided. The

problem presented by this case has not been previously considered by this Court.

The only case in which comments on this issue appear is *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966). In the Court's opinion, Mr. Justice Stewart noted:

> "We may assume the state can validly provide for recoupment of the cost of appeals from those who later become financially able to pay." l.c. 311.

Mr. Justice Harlan added in a dissenting opinion:

> "I find no substance to appellant's main argument, which the court lays aside, that to permit any such recoupment from an indigent is an unconstitutional deterrent to appeal. Nor do I think there is any force to the argument in N.4 (ante, P. 580), not even suggested by appellant, which at best goes to the validity of the statutes governing compensation and not to the reimbursement statute being reviewed." l.c. 311.

However, the issue in *Rinaldi* was whether or not a distinction in recoupment could constitutionally exist between those defendants subsequently incarcerated (who were required to reimburse the state), and those who were released from confinement (who were not required to reimburse the state). The New Jersey approach in *Rinaldi* violated the equal protection clause. l.c. 310-311.

Other authority on this subject is virtually nonexistent. There are no federal district nor circuit court decisions in point, or even relevant. There are four state court decisions from different courts, several not directly in point, and the others commenting in dicta on the issue. The Ohio Court of Appeals noted that a provision of the Ohio code which made a defendant liable for the cost of appointed counsel, enabled the state to make such

costs a part of a civil judgment which could be collected with normal civil remedies for enforcement of civil judgments. *Ex parte Wilson*, 36 App. 2d 854, 183 N.E.2d 625 (1962). The Iowa Supreme Court has observed in *dictum*:

> "It would be constitutionally permissible for the Legislature to include a provision that expenditures made under this section [Section 775.5, providing payment of certain enumerated expenses to those serving an indigent defendant] be taxed as part of the cost against a defendant convicted either as a result of jury trial or plea of guilty." *Woodbury County* v. *Anderson*, 164 N.W.2d 129, 133-34 (Iowa, 1969).

The New Hampshire Supreme Court in an advisory opinion concluded that a state provision requiring some reimbursement by the indigent defendant on whose behalf sums were expended for attorney's fees violated a state constitutional provision which provided that a person "shall have the right to counsel at the expense of the state as need is shown . . . ". *Opinion of the Justices*, 256 A.2d 500, 502 (N.H. 1969). The California Supreme Court has held that the state may not impose a condition that the defendant reimburse the county for legal fees expended on his behalf when granting probation. *In re Allen*, 78 Cal. Rptr. 207, 455 P.2d 143, 144 (1969). Cf., *Davis* v. *Ziem*, 383 Mich. 717, 178 N.W.2d 920, 922 (1970). Our research has revealed no other relevant authority.

In many ways, the issue presented is difficult to confront in a precise manner. It is easy enough to say that the Federal Constitution guarantees the right to counsel in criminal actions in state courts. It is much more difficult to define in particular instances what the "right to counsel" is. That is the problem we face here. The three-judge court predicated its holding on several broad conclusions. First, the Court noted that:

> "Any construction of the Kansas statute which leaves intact the state's right to recover legal expenses from indigents is a construction which inevitably impinges upon and undermines the rights protected in Gideon." l.c. 1234, Jurisdictional Statement, A. 7.

The Court went further and applied its conclusion to any method by which the state might attempt to recoup legal expenses.

> "Consequently, we believe that the inevitable effect of the Kansas statute which in any wise seeks to recover defense costs from indigents is to unconstitutionally burden and suppress the exercise of the constitutional right to counsel." l.c. 1234, Jurisdictional Statement, A. 8.

The Court also observed that the challenged portion of the Kansas Indigent Act is unnecessary and therefore excessive. l.c. 1233, Jurisdictional Statement, A. 6.

We therefore have several rather significant concepts to delineate in reaching a solution to the problem presented. When we use the phrase "right to counsel" precisely what is it that we mean the Constitution guarantees. Does the Constitution guarantee that a man will not be tried in a criminal case without the opportunity of representation by counsel regardless of his current financial situation? Does the Constitution require that the state provide *free counsel* to every indigent accused of a crime regardless of his subsequent ability to reimburse the state for expenses paid on his behalf? Or, does the Constitution require that every defendant accused of a crime have an absolutely unlimited right to any and all defense services?

We are mindful of the various pronouncements concerning the nature of the right to counsel and its sig-

nificance. We only refer to the words of Mr. Justice Black in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

> "From the very beginning, our State and National constitutions and laws have laid great emphasis on procedural and substance of safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if a poor man charged with a crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell* v. *Alabama*: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to to be heard by counsel.' " l.c. 344-345.

The import of *Gideon* as well as such right to counsel and/or equal protection cases as *Griffin* v. *Illinois*, 351 U.S. 12 (1956) and *Douglas* v. *California*, 372 U.S. 353 (1963), is that a man's financial situation at the time he stands charged with a crime should not cause him to lose substantive or procedural requisites of a fair trial. Thus, the fact that an accused was poor and could not afford a lawyer at a criminal trial required some affirmative action on behalf of the prosecuting sovereign to provide counsel on the accused's behalf. *Gideon, supra.* The same could be said for the processing of an appeal. Not only must the prosecuting sovereign provide counsel for the appeal, but all the necessary ingredients to make any appeal taken as a matter of right available to the same degree as it is available to those who are able to afford it. *Douglas, supra*; *Griffin, supra.*

It is significant, however, that the indigent accused's financial situation should not create additional rights, that is rights that would not be in existence if the accused

could not qualify as an indigent. We are not aware of any decision which holds that the indigency determination for right to counsel confers rights not held by the non-indigent, that is absolute economic or financial non-responsibility. The trial court's opinion operates to confer such rights. Such an effect is not required by the Constitution, nor should it be required.

What the Constitution does require is that the State provide an accused with an opportunity to be heard by counsel. The State is required, in other words, to negative any prohibitive situation created by the accused's current financial status. Regardless whether the statute providing for appointment of counsel after an accused qualifies as an indigent might also provide a method by which this State could seek recoupment, the opportunity to be heard by counsel exists. As a matter of fact, the situation that exists under the Kansas statute places the accused in a more analogous situation vis-a-vis non-indigent defendant, than does the concept that the State ought to be required to provide absolutely free counsel with no economic consequences.

In addition to consideration of the nature of the right to counsel, other questions inevitably arise. What is a condition upon the exercise of the constitutional right to counsel? Is it not a condition upon the exercise of that right that the indigent has no choice in selecting the counsel who will represent him? Is it not a condition upon the exercise of that right that court-appointed counsel in individual cases might be attorneys who have little or no experience in criminal cases, or little or no experience at all? It would seem that knowledge on the part of those accused of crimes that they were likely to get the inexperienced lawyer appointed to represent them would be a condition on the free exercise of the right to counsel.

If we were to conclude that authorization for the state to recover legal expenses in a civil action, with civil remedies, is a condition on the exercise of the constitutional right to counsel, it must be because we also conclude that somebody who is poor will not wish to have that civil proceeding exist. Or, the condition or burden will exist because of the man's economic status. And yet, if we are willing to make that conclusion, what do we think of those citizens who are accused of crimes who do not qualify under the Indigency statute, and yet do not have enough means to readily employ any attorney they wish, that is the most experienced and expensive, to defend them in criminal cases. Does not their economic status, even though they are not indigent, condition the exercise of their right to counsel. Obviously it does.

Although an indigent accused does have the right to counsel, the exercise of that right is as a matter of fact conditioned upon many factors, and is in its exercise affected by many considerations. The three judge court found fault with the Kansas statute because knowledge of the recoupment provisions of the Kansas statute might lead an accused to refuse to exercise the right to counsel. Of course, an equally valid assumption is that anyone qualifying under the indigent statute would really not care whether a civil judgment could be taken, because he would have no property against which that judgment might be enforced. In any event, the assumption made by the three judge court is speculation. If a problem of that nature would arise in any individual case, it would be the responsibility of the appointing judge to insure that the defendant's rights are protected. That situation was never reached in the current case. The record is absolutely clear that appellee's exercise of his right to counsel was not in any way affected by the existence of the reimbursement provision. (A. 10-11)

In practice there are many conditions on the exercise of the right to counsel. The indigent has to take the attorney who is appointed. The indigent may be represented by an inexperienced lawyer. The appointed lawyer may not have the same supportive resources available as would the retained lawyer.

The trial court found the Kansas statute constituted an unconstitutional condition upon the exercise of the right to counsel. That the statute places a condition upon the use of appointed counsel is true. But, the mere existence of the condition does not mean that an unconstitutional burden is placed on the exercise of a constitutional right. If the trial court's reasoning is correct, the entire system of representation by counsel in criminal cases places unconstitutional burdens on the exercise of a constitutional right. Further, if a provision allowing reimbursement of legal expenses is an unconstitutional condition on the exercise of a constitutional right, then the same reasoning would require a conclusion that allowing judgment for costs against convicted defendants (*E.g.*, Ark. Stat. Ann., §§ 43-2316, 2403, 2404, 2405; Colo. Rev. Stat., §§ 39-10-5, 39-10-6; Del. Code Ann., Title 11, § 4101) unconstitutionally burdens the exercise of the right to a jury trial.

Neither the right to counsel, or any other constitutional right, exists in a vacuum. The test therefore must be whether the condition needlessly burdens the exercise of a constitutional right. *United States* v. *Jackson*, 390 U.S. 570, 582-83. (1968) In *Jackson*, portions of the federal kidnapping statute were challenged. The statute provided that if trial were had to a court, or if a plea of guilty were made by the defendant, the maximum penalty would be life imprisonment. However, the same statute for the same crime provided that if the jury determined guilt, the maximum penalty could be death. There was no rational reason for distinction between the types of penalties. The distinction that existed was not re-

lated in any rational way to the evil protected against. Such is not the case here. The condition is related to the concept of State appointed counsel, and particularly to the problem of funding such a program. The challenged statute is rationally related to the end of attempting to raise money to help defray the costs of providing appointed counsel. The fact that there may be other forms of achieving the same results, or that one viewing the statute might doubt its wisdom, is not germane. The reimbursement provisions are rationally related to the problem of funding court appointed counsel programs.

The situation presented with this statute is dissimilar from the situation facing this court in the *United States* v. *Robel*, 389 U.S. 258 (1968). There, an employee of the government had a choice of foregoing a constitutional right and retaining his job, or losing his job. Again, the crux of the Court's decision had to be that the condition placed upon the exercise of a constitutional right was not, in its enacted form, relevant to the evil to which the statute was directed, a situation not true in our case.

The three judge court then held that the statute allowing reimbursement, in any way, at any time, was a needless and unnecessary condition on the exercise of the right to counsel. Is it necessary that the State of Kansas be allowed to seek to reimburse its State Treasury for expenses spent for appointed counsel? The Legislature of the State of Kansas apparently thinks so, because it enacted such a procedure. It is the responsibility of the Kansas Legislature to determine what is and is not necessary with regard to the expenditure of public funds from the Kansas Treasury. Apparently the Legislature believes the provision necessary. To believe otherwise would require the conclusion that the Legislature enacted a scheme for recoupment of expenses that requires performance of services and expenditure of time and effort on behalf of State officials for no observable purpose. Why would the

Legislature have made that commitment on the part of the State had not it also made a legislative determination of the need of the reimbursement provisions.

The trial Court also concluded that the reimbursement provisions were needless. The Court observed that it was useless to require an *indigent* to repay monies expended. If the defendant is indeed indigent after payments are made from the Indigent Defendants fund, and remains indigent for five (5) years, then use of the statute has not accomplished anything. However, if the defendant did own property that he conveyed to someone else after the commission of a crime, or if the defendant does have financial resources within five (5) years after expenditures are made on his behalf, then the statute is certainly not useless. The blanket conclusion that the statute is needless or useless is not valid. Without having an opportunity to use much enforcement due to the statute's short lived tenure, approximately $17,000.00 was recouped by the State. Not much relative to total expenditures, but a significant sum of money.

CONCLUSION

The Legislature of the State of Kansas has made a determination that attempting to recoup expenditures for legal services from those declared indigent during criminal proceedings is a desirable and necessary portion of the State's attempt to provide defense services to indigent defendants. We must assume that the Legislature was aware that the program enacted would require time and effort on the part of State Officials, and even considering that expenditure and the probability that in some cases no recovery or reimbursement could be had, still felt the objective of reimbursing the state treasury was a necessary portion of the legislative enactment. We submit that an unconstitutional condition or burden is not placed on the

exercise of a constitutional right when that condition requires that the indigent defendant be placed in the same circumstances as any other defendant with regard to exercising responsibility for compensation of defense counsel. We submit that the three judge court erred when it concluded that any attempt on the part of the State of Kansas to in any way attempt to recover monies expended for legal services from an indigent defendant is unnecessary or needless. We submit that the three judge court erred when it held, as it must have, that the State of Kansas cannot attempt to recover or recoup expenses for legal services from those who fraudulently use the provisions of the aid to indigent defendants act. We submit that the three judge court erred when it concluded, as it must have, that the State of Kansas could not constitutionally attempt to recoup expenditures for legal services from those who are at one time indigent, thus qualifying for State assistance, but who later are financially able to reimburse the state for the expenditures made. We submit that the three judge court erred when it determined that the reimbursement provisions of K.S.A. 1971 Supp. 22-4513 were unconstitutional on their face, and therefore restrained further enforcement of the provisions of that act. The decision of the three judge court should be reversed with directions to enter judgment for defendant-appellant.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-11

JAMES R. JAMES, Judicial Administrator, and
THE STATE OF KANSAS,
Appellants,

VS.

DAVID E. STRANGE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellee has examined the sections of Appellant's brief denominated *Opinion Below, Jurisdiction, Question Involved*, and *Statute Involved*. Appellee feels that the Appellant has accurately set out what is required under Rule 40 of the Supreme Court Rules. Appellee does, however, observe that the Appellant glossed over the District Court's findings in making the statement with respect to *Jurisdiction*. The District Court found, as a matter of fact, that K.S.A. 22-4513 unconstitutionally chills an indigent's exercise of his right to counsel guaranteed by the Sixth Amendment to the United States Constitution. (A. 15)

The State, in its Notice of Appeal, correctly says, in effect, that this finding of fact raises the question of law of whether the existence of state statutory procedures providing for the collection from an indigent defendant of monies expended by the State to furnish him counsel constitutes an *unlawful burden* upon an indigent defendant's Sixth Amendment right to the assistance of counsel.

ARGUMENT AND AUTHORITIES

I. The Challenged Portion of the Kansas Aid to Indigent Defendants Act, K.S.A. 22-4513, Is Not Constitutional in That It, in Fact, Burdens, Impedes, and Impinges upon the Indigent Accused's Exercise of a Basic Right—the Right to Have the Assistance of Counsel for His Defense. (Amendment VI, United States Constitution)

In writing the Appellant's brief, it seems that the attorneys for the Appellant have taken a scattergun approach to their subject while avoiding the pertinent aspects of the case. In many respects, picking the points out of the Appellant's brief is much like picking buckshot out of the broad side of a barn. It is indeed difficult to identify and answer all of the points of argument embedded in the Appellant's brief. However, it is somewhat encouraging to the Appellee to note the lack of conviction in the tone and the lack of cohesion in the plan of the Appellant's brief. It may be supposed that recovering a mere $17,000 over two years from the indigents (in most cases, as I know from my own experience, paid by relatives) would cause one to have a real lack of conviction. (See Appellant's brief, p. 10) The cost of the extra clerks necessary to handle the paperwork involved probably equalled the amount recovered.

Now, Circuit Judge Delmas C. Hill noted in his opinion (see Appendix to Jurisdictional Statement, p. A. 4):

"Plaintiff's most appealing contention is that enforcement of Section 22-4513 infringes upon his right to assistance of counsel because the statute has a chilling effect on the exercise of the right to counsel. Conversely, the question may be put whether the continued viability of the decision in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), requires the state to provide free court-appointed counsel to those accuseds who, like plaintiff, are financially unable to employ an attorney."

Of course, the accused, under this challenged statute, would not be limited to the problem of whether to accept court-appointed counsel. The accused's decision, under this Kansas statute, would have to include a consideration of whether to exercise other basic rights—the right to a jury trial (Article 3, Section 2, cl. 3, U. S. Constitution, and *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491), the right to confront and cross-examine the witnesses accusing him (*Pointer* v. *State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923), the right to subpoena witnesses on his own behalf (*Washington* v. *Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019). The accused also would have to consider whether he wanted to subject himself to a judgment in and of itself: just how much should this judgment and the interest thereon be? Should the indigent accused's decision be based upon his needs? Or should the states be allowed to "chill" the indigent accused's exercise of basic rights in his hapless circumstances?

The State, in its brief, says at page 10:

"The sole issue presented is whether or not the State of Kansas may, if its legislature so decides, enact a statute providing a procedure for collection of expenses, including attorney's fees, from those persons determined to be indigent on whose behalf such funds were provided . . ."

While claiming to be mindful of the nature of the right to counsel (Appellant's brief, page 13), the State finally outlines the problem from its point of view: that the indigent accused's financial situation should not create additional rights. The State says, in effect, that the non-indigent person has to determine just how much in the way of court procedure he wishes to avail himself of and that the indigent now has a carte blanche power which discriminates, not against the rich, but against some non-indigents.

This whole argument relates to a different standard than the one necessary for our constitutional scheme of government. As stated in *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has" (351 U.S. at 19). The standard must relate to the rich man. The plaintiff here was and is an indigent. He was an indigent at the time of his arrest; he was an indigent at the time he attempted to employ his own counsel; he was an indigent at the time counsel was appointed for him; and he remains an indigent today. As pointed out by Mr. Justice Douglas in *Douglas* v. *California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963):

> "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual while the rich man has a meaningful appeal." (372 U.S. at 358)

Notwithstanding the State then says that the assumption by the District Court that the Kansas statute chills the indigent from the exercise of a basic right is speculation. (See Appellant's brief, p. 16) Yes, the basic complaint by the State is that some no-account, some poor, needy person, some indigent is going to get a better shake in the halls of justice than some average, tax-paying, indignant solid citizen.

By making such an argument, it seems to Appellee that the State is admitting that the reimbursement provisions do have a chilling effect on the free exercise of some basic rights—rights guaranteed constitutionally to all citizens of the United States. Does the mythical average, tax-paying indignant solid citizen wish to ignore the plain wording of the Sixth Amendment to the United States Constitution? Shouldn't this solid citizen feel more secure due to this effort to provide equal justice to the indigent? Should the state legislature be allowed to subvert, pervert and corrupt basic rights of the people? Should this Court endorse any state action which "chills" the exercise of basic rights?

The State, then, by arguing that the "poor" get "additional rights", admits the chilling effect of the reimbursement provisions of the challenged statute. However, the State attempts to divert our attention from the fundamental rights issue by asserting that the State was really only interested in "revenue"; thus, the provision for recovery of expenditures was included in the Indigent Defendants Act. (See Appellant's brief, p. 9) The State contends that this condition is all right because there are *many conditions* on the exercise of the right to counsel: (1) the indigent has to take the attorney who is appointed; (2) the indigent may be represented by an inexperienced attorney; and (3) the appointed attorney may not have the same supportive resources available as would the retained at-

torney. (See Appellant's brief, p. 17) This is egregious logic. The matters referred to as "conditions" by Appellant relate to who is appointed and to the quality of performance of counsel, not to the basic right to the assistance of counsel.

The State goes on to say in its brief at page 18 that the reimbursement provisions are "rationally related" to the problem of funding court-appointed counsel programs. Surely, the problem of funding will not be commingled with the exercise of a basic, fundamental right.

The State then says that it is the responsibility of the Kansas legislature to determine what is and what is not necessary with regard to public funds from the Kansas Treasury. (Appellant's brief, p. 18) But this responsibility to determine what is necessary with regard to public funds must be subordinated to a more primary responsibility: to insure each and every one of us basic rights. The primary responsibility of government is to organize its powers in such form as to provide safety and happiness, being ever mindful that its powers are derived from the consent of the governed.

Lastly, the State contends that the test of the validity of the legislative action is whether the condition *needlessly* burdens the exercise of a basic right. (Appellant's brief, p. 17) Surely the State did it for an "observable purpose"; a need for reimbursement. (Appellant's brief, p. 18)

Judge Hill, in writing for the District Court, did an outstanding job of discussing the issue with which the State is struggling: whether the chilling effect is unnecessary and, therefore, excessive. Judge Hill states:

> ". . . And if the legislative objective is other than to deter the exercise of rights, the objective '(C)annot be pursued by means that needlessly chill the exer-

cise of basic constitutional rights. The question is not whether the chilling effect is "incidental" rather than "intentional"; the question is whether the effect is unnecessary and therefore excessive.'

"We must conclude that Section 22-4513 is unnecessary and therefore excessive. What can be more unnecessary than trying to recoup costs of counsel from an individual already adjudged to be an indigent and by definition unable to stand the very expense in question? In this light it is apparent that the statute needlessly encourages indigents to do without counsel and consequently infringes on the right to counsel as explicated in Gideon v. Wainwright, supra.

"Since we believe that the statute in its present form is a needless burden or condition on the exercise of a constitutional right, our attention now turns to whether the statute can be construed in any way to eliminate its chilling effect. In answer to this question, it appears that as long as the statute in any way requires the indigent to repay the state for legal services, the statute will remain as an unconstitutional burden to the exercise of constitutional rights, as those rights were laid out in Gideon v. Wainwright, supra.

"Unquestionably the guiding principle behind the Gideon decision was, 'The financial ability of the individual has no relationship to the scope of the (constitutional) rights (to counsel) involved here,' Miranda v. Arizona, 384 U.S. 436, 472 (1966).

"It is safe to say that the right to counsel is absolute and should not be fettered by the poverty of the accused because, as was indicated in Miranda v. Arizona, supra, the right to counsel does not mean that a defendant can consult a lawyer only if he has the funds to obtain one. To maintain unimpaired the con-

cept embodied in the Gideon decision, it appears necessary that the state pay for the indigent's legal counsel when the defendant cannot afford the cost. Anything less appears to be an impermissible impediment to the exercise of a constitutional right."

After examination of the State's brief, one can see that the effort here is an attempt to overturn, to limit, and to thwart the impact and viability of the decision of *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 1461 (1963). Since that decision it has been clear that the State must furnish counsel, and it is equally clear that this is the responsibility (or burden) of the State, just as it is the responsibility (or burden) of the State to furnish an agency to enforce the law. Question: Who can say that a lawyer assigned to represent an accused is not also enforcing the law?

The language in *Gideon* drives home the point that lawyers in criminal courts are necessities, not luxuries. *Gideon* points out that, in our adversary system of criminal justice, any person haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. The Court also noted that, throughout the history of the United States, the laws, the constitutions of the various states and of the United States, have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. The Court further noted that this noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

There is no need to change, to overturn, to limit, or to undermine *Gideon*. (See Appellant's brief, p. 10) The Kansas statute in question here, and any of the other statutes which burden the exercise of a basic right, should be declared unconstitutional.

II. The Need for the Unfettered Right to Counsel Is Paramount: The Decision Here Should Be Based on This Paramount Need and Not Confused with Niceties Involving the Equal Protection Clause or the Due Process Clause.

An article entitled "Coming: The Right to Have Assistance of Counsel at All Appellate Stages," 52 ABAJ 135 (1966), discusses the relationship, if any, of the equal protection clause of the Fourteenth Amendment and the relationship of the due process clause, if any, with the unfettered right to counsel. The author, Mr. Jack G. Day, discusses them in a meaningful way as these two concepts relate to the matter before the Court in the instant case. At page 136 of the article, Mr. Day notes that:

> "The Sixth Amendment makes no distinction between pretrial, trial, appeal, and post trial representation nor between capital and non capital or felony and misdemeanor cases. The breadth of the phrase 'the right . . . to have the Assistance of Counsel for his defense' in 'all criminal prosecutions' will lend itself an argument for the right to counsel at whatever stage and under whatever charge the accused finds himself threatened. However, the Supreme Court has indicated implicitly that counsel is required only at a 'critical stage'. *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961). That an appeal falls within any reasonable interpretation of 'critical stage' is an obvious proposition. Moreover, the transcript cases' emphasis on equal protection forecasts more for the right to counsel at the appellate level than does the Sixth Amendment as encompassed by the due process clause of the Fourteenth.
>
> "In *Douglas* v. *California*, no mention is made of the Sixth Amendment in the majority opinion. And, although it would be hard to prove from the mere ab-

sence of comment that no attention was paid to the Sixth Amendment in reaching the conclusions there, it is apparent from what is said that the main theoretical thrust in the case comes from the equal protection clause of the Fourteenth. This point acquired additional significance from the fact that *Gideon* was decided the same day as *Douglas*. And, having freshly read the due process clause in *Gideon* as requiring counsel *on the trial* of an indigent defendant, the majority of the Court chose to place its decision on the right to *appellate* counsel squarely on the equal protection clause, passing over (so it seems) the basis for its decision of that same day in *Gideon*.

"Mr. Justice Douglas, speaking for the majority, ignored the due process clause. Instead, he repeatedly repaired to the equal protection concept central to the transcript cases.

"Justice Black, in surprisingly conciliatory language in view of his firm position that the due process clause of the Fourteenth Amendment includes the specifics of the Bill of Rights, said: 'We accept *Betts* v. *Brady's* assumption, based as it was on our prior cases that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory on the states by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights'. (372 U.S. at 342)

"Whether one adopts the 'fundamental and essential to a fair trial' argument (otherwise known as the 'implicit in the concept of ordered liberty' thesis) or thinks 'due process' is, among other things, shorthand for an application of the guarantees in the first eight amendments to the states, *makes little difference once*

the Court has found a particular right to be 'fundamental'. However, there is a great practical difference. So long as a right is not explicitly protected on one theory or the other but merely considered along with other facts in determining whether a 'fair trial' has been accorded, as was formerly the case with respect to the right to 'assistance of counsel', the 'right' has little security. For example, the 'fair trial' concept gave it an unusual plasticity to the right to counsel proposition. See *Betts* v. *Brady*, 316 U.S. 455 (1942), for a bizarre application of the pre-*Gideon* principle to deny counsel."

Mr. Day, on pages 136 and 137, further notes that:

"If one credits the emphasis of the opinion in *Douglas*, the right to counsel on appeal apparently does not depend on the *Gideon* rationale and therefore depends on neither the absorption of the Sixth Amendment into the Fourteenth Amendment's due process clause nor protection of the same right to appellate counsel as 'a fundamental principle of liberty and justice' implicit in due process. The denial of counsel to an indigent defendant is proscribed because it is an invidious discrimination contravening the equal protection clause of the Fourteenth Amendment. In effect, this may amount to the absorption of the Sixth Amendment's right to counsel into the equal protection clause, but if this is its theory the majority of the court does not say so. In any event, the implications of the 'equal justice for rich and poor' doctrine are far reaching."

This discussion is applicable to the matter at hand. After *Gideon* the State must grant an unfettered right to counsel: that right is not dependent upon the due process clause nor is it dependent upon the equal protection clause of the Fourteenth Amendment.

Mr. Lee Silverstein, in his article, "The Continuing Impact of *Gideon* v. *Wainwright* on The States", 51 ABAJ 1023, points out many of the questions raised by *Gideon* (and other) decisions. (See page 1026) He mentions the problem of reimbursement but *does not analyze it constitutionally*. He notes, particularly, as does the State herein, that the Criminal Justice Act of 1964 infers that there may be reimbursement. 18 U.S.C.A. 3006A (f).

Later Mr. Dallin H. Oaks, in his article, "Improving The Criminal Justice Act", 55 ABAJ 217 (1969), details in more depth the aspect of reimbursement as it relates to the issue of appointment of counsel for indigent defendants. At page 219 of his article, Mr. Oaks points out that a handful of jurisdictions require a convicted C.J.A. defendant to reimburse the treasury as a condition of probation. Then he notes that this requirement is probably unconstitutional under *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966). Of course the Supreme Court of the State of California in *In re. Allen*, 1969, 78 Cal.Rptr. 207, 455 P.2d 143, on the basis of the chilling effect that reimbursement has on the exercise of the basic fundamental right, did, in fact, declare this procedure unconstitutional.

The case before the Court is an example of the reluctance on the part of some to provide an unfettered right to counsel for the indigent. Stated in other words, there is a feeling that some of the indigents should have to pay back to the state what the state has paid to the indigent's appointed counsel. *The problem is figuring out how to do it constitutionally.* (Opinion of the Justices, N.H., 1969, 256 A.2d 500)

In *Allen*, supra, as in this case, the accused was not forewarned of the possibility of indebtedness to the county (or state) for the cost of counsel. Justice Burke pointed out at p. 144:

". . . The government is without constitutional authority to impose a predetermined condition on the exercise of a constitutional right or penalize in some manner its use. (See *Gardner* v. *Broderick*, (1968) 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (police officer would be discharged unless he waived immunity from prosecution); *Uniformed Sanitation Men Ass'n* v. *Commissioner*, (1968) 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (garbage men would be discharged unless they testified at a hearing investigating their activities); *Griffin* v. *California*, (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (adverse comment unless defendant testified); *United States* v. *Jackson*, (1968) 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (federal statute provided that if defendant waived a jury the death penalty could not be imposed).)"

The statement of the right to assistance of counsel is clear: the fact that the Kansas statute, K.S.A. 22-4513, penalizes the exercise of this basic right is obvious. Again, the need for the unfettered right to counsel is paramount; the decision here should be based on this paramount need and not confused with niceties involving the equal protection clause or the due process clause.

CONCLUSION

The Kansas statute attacked herein does, in fact, have a chilling effect precisely when the indigent needs to avail himself of a fundamental right. The Kansas statute needlessly burdens the exercise of a basic right. The State shouldn't be allowed to pervert our precious constitutional guarantees nor frustrate our basic constitutional framework of government by a provision of law which would cause the poor to be relegated as a class to a position where they wouldn't have hope, wouldn't have faith in our participating democracy.

History advises that governments and laws tend to militate against those who are least able to defend themselves. The rights of the poor in our society have, for lack of adequate equal counsel, too often been unprotected. Injustices that could have been prevented, had they been brought before the bar, have often continued unabated.

When I undertook the court appointment to do my best for David E. Strange, I most certainly did not contemplate that I would become so involved that I would take his case to a Three-Judge Federal District Court. Nonetheless, I failed to tell David Strange that I wasn't "free" court-appointed counsel. Thus, I have felt morally obligated to bring this case to those who can prevent an injustice to this poor boy, and to others in similar circumstances. This case, to use the State's logic, has created something of a burden on me. However, I am proud to be an American and to aid and assist the unfortunate. Hopefully, I can help in some small way to reinforce my belief that our democracy will work. I know that my position and my belief as to David Strange's case are right. I have confidence that the Supreme Court of the United States will agree with me and will uphold the decision and judgment of the Three-Judge District Court declaring the Kansas statute, K.S.A. 22-4513, to be unconstitutional.

The Court must continue fearlessly: it must not allow the various state legislatures or the Congress to forget what makes this country great. Free legal counsel for the indigent accused must be recognized and reiterated as a fundamental right of a free society.

Respectfully submitted,

JOHN E. WILKINSON,
Attorney for the Appellee,
David E. Strange

JAMES, JUDICIAL ADMINISTRATOR, ET AL. *v.* STRANGE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 71–11. Argued March 22, 1972—Decided June 12, 1972

Kansas recoupment statute enabling State to recover in subsequent civil proceedings legal defense fees for indigent defendants, invalidated by District Court as an infringement on the right to counsel, *held* to violate the Equal Protection Clause in that, by virtue of the statute, indigent defendants are deprived of the array of protective exemptions Kansas has erected for other civil judgment debtors. Pp. 129–142.

323 F. Supp. 1230, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

Edward G. Collister, Jr., Assistant Attorney General of Kansas, argued the cause for appellants. With him on the brief were *Vern Miller*, Attorney General, and *Matthew J. Dowd*, Assistant Attorney General.

John E. Wilkinson argued the cause and filed a brief for appellee.

Marshall J. Hartman filed a brief for the National Legal Aid and Defender Association as *amicus curiae*.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents a constitutional challenge to a Kansas recoupment statute, whereby the State may recover in subsequent civil proceedings counsel and other legal defense fees expended for the benefit of indigent defendants. The three-judge court below held the statute unconstitutional, finding it to be an impermissible burden upon the right to counsel established in *Gideon*

v. *Wainwright*, 372 U. S. 335 (1963).[1] The State appealed and we noted jurisdiction, 404 U. S. 982.

The relevant facts are not disputed. Appellee Strange was arrested and charged with first-degree robbery under Kansas law. He appeared before a magistrate, professed indigency, and accepted appointed counsel under the Kansas Aid to Indigent Defendants Act.[2] Appellee was then tried in the Shawnee County District Court on the reduced charge of pocket picking. He pleaded guilty and received a suspended sentence and three years' probation.

Thereafter, appellee's counsel applied to the State for payment for his services and received $500 from the Aid to Indigent Defendants Fund. Pursuant to Kansas' recoupment statute, the Kansas Judicial Administrator requested appellee to reimburse the State within 60 days or a judgment for the $500 would be docketed against him. Appellee contends this procedure violates his constitutional rights.

I

It is necessary at the outset to explain the terms and operation of the challenged statute.[3] When the State

[1] The opinion of the three-judge court is reported in 323 F. Supp. 1230 (Kan. 1971).

[2] Kan. Stat. Ann. §§ 22–4501 to 22–4515 (Supp. 1971).

[3] Kan. Stat. Ann. § 22–4513 (Supp. 1971). The statute reads as follows:

"(a) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by section 10, . . . such defendant shall be liable to the state of Kansas for a sum equal to such expenditure, and such sum may be recovered from the defendant by the state of Kansas for the benefit of the fund to aid indigent defendants. Within thirty (30) days after such expenditure, the judicial administrator shall send a notice by certified mail to the person on whose behalf such expenditure was made, which

provides an indigent defendant with counsel or other legal services, the defendant becomes obligated to the State for the amount expended in his behalf. Within 30 days

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notice shall state the amount of the expenditure and shall demand that the defendant pay said sum to the state of Kansas for the benefit of the fund to aid indigent defendants within sixty (60) days after receipt of such notice. The notice shall state that such sum became due on the date of the expenditure and that the sum demanded will bear interest at six percent (6%) per annum from the due date until paid. Failure to receive any such notice shall not relieve the person to whom it is addressed from the payment of the sum claimed and any interest due thereon.

"Should the sum demanded remain unpaid at the expiration of sixty (60) days after mailing the notice, the judicial administrator shall certify an abstract of the total amount of the unpaid demand and interest thereon to the clerk of the district court of the county in which counsel was appointed or the expenditure authorized by the court, and such clerk shall enter the total amount thereof on his judgment docket and said total amount, together with the interest thereon at the rate of six percent (6%) per annum, from the date of the expenditure thereof until paid, shall become a judgment in the same manner and to the same extent as any other judgment under the code of civil procedure and shall become a lien on real estate from and after the time of filing thereof. A transcript of said judgment may be filed in another county and become a lien upon real estate, located in such county, in the same manner as is provided in case of other judgments. Execution, garnishment, or other proceedings in aid of execution may issue within the county, or to any other county, on said judgment in like manner as on judgments under the code of civil procedure. None of the exemptions provided for in the code of civil procedure shall apply to any such judgment, but no such judgment shall be levied against a homestead. If execution shall not be sued out within five (5) years from the date of the entry of any such judgment, or if five (5) years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant and shall cease to operate as a lien on real estate of the judgment debtor. Such dormant judgment may be revived in like manner as dormant judgments under the code of civil procedure.

"(b) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense

of the expenditure, the defendant is notified of his debt and given 60 days to repay it.[4] If the sum remains unpaid after the 60-day period, a judgment is docketed against defendant for the unpaid amount. Six percent annual interest runs on the debt from the date the expenditure was made. The debt becomes a lien on the real estate of defendant and may be executed by garnishment or in any other manner provided by the Kansas Code of Civil Procedure. The indigent defendant is not, however, accorded any of the exemptions provided by that code for other judgment debtors except the homestead exemption. If the judgment is not executed within five years, it becomes dormant and ceases to operate as a lien on the debtor's real estate, but may be revived in the same manner as other dormant judgments under the code of civil procedure.[5]

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services to any defendant, as authorized by section 10, . . . a sum equal to such expenditure may be recovered by the state of Kansas for the benefit of the aid to indigent defendants fund from any persons to whom the indigent defendant shall have transferred any of his property without adequate monetary consideration after the commission of the alleged crime, to the extent of the value of such transfer, and such persons are hereby made liable to reimburse the state of Kansas for such expenditures with interest at six percent (6%) per annum. Any action to recover judgment for such expenditures shall be prosecuted by the attorney general, who may require the assistance of the county attorney of the county in which the action is to be filed, and such action shall be governed by the provisions of the code of civil procedure relating to actions for the recovery of money. No action shall be brought against any person under the provisions of this section to recover for sums expended on behalf of an indigent defendant, unless such action shall have been filed within two (2) years after the date of the expenditure from the fund to aid indigent defendants."

[4] Failure to receive notice, however, does not relieve the person to whom it is addressed of the obligation.

[5] A dormant judgment may be revived within two years of the date on which the judgment became dormant. Kan. Stat. Ann. § 60–2404 (1964).

Several features of this procedure merit mention. The entire program is administered by the judicial administrator, a public official, but appointed counsel are private practitioners. The statute apparently leaves to administrative discretion whether, and under what circumstances, enforcement of the judgment will be sought. Recovered sums do, however, revert to the Aid to Indigent Defendants Fund.

The Kansas statute is but one of many state recoupment laws applicable to counsel fees and expenditures paid for indigent defendants.[6] The statutes vary widely in their terms. Under some statutes, the indigent's liability is to the county in which he is tried; in others to the State. Alabama and Indiana make assessment and recovery of an indigent's counsel fees discretionary with the court. Florida's recoupment law has no statute of limitations and the State is deemed to have a perpetual lien against the defendant's real and personal property and estate.[7] Idaho, on the other hand, has a five-year statute of limitations on the re-

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[6] There is also a federal reimbursement provision, 18 U. S. C. § 3006A (f):

"Receipt of other payments.—Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant."

[7] The board of county commissioners has discretion to compromise or release the lien, however. Fla. Stat. Ann. § 27.56 (Supp. 1972–1973).

covery of an "indigent's" concealed assets at the time of trial and a three-year statute for the recovery of later acquired ones. In Virginia and West Virginia, the amount paid to court-appointed counsel is assessed only against convicted defendants as a part of costs, although the majority of state recoupment laws apply whether or not the defendant prevails. It is thus apparent that state recoupment laws and procedures differ significantly in their particulars.[8] Given the wide differences in the features of these statutes, any broadside pronouncement on their general validity would be inappropriate.

We turn therefore to the Kansas statute, aware that our reviewing function is a limited one. We do not inquire whether this statute is wise or desirable, or "whether it is based on assumptions scientifically substantiated." *Roth* v. *United States*, 354 U. S. 476, 501 (1957) (separate opinion of Harlan, J.). Misguided laws may nonetheless be constitutional. It has been noted both in the briefs and at argument that only $17,000 has been recovered under the statute in its almost two years of operation, and that this amount is negligible compared to the total expended.[9] Our task, however, is not to weigh this statute's effectiveness but its constitutionality.

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[8] State recoupment statutes, including those quoted above, are as follows:

Ala. Code, Tit. 15, § 318 (12) (Supp. 1969); Alaska Stat. § 12.55.020 (1962); Fla. Stat. Ann. § 27.56 (Supp. 1972–1973); Idaho Code § 19–858 (Supp. 1971); Ind. Ann. Stat. § 9–3501 (Supp. 1970); Iowa Code Ann. § 775.5 (Supp. 1972); Md. Ann. Code, Art. 26, § 12C (Supp. 1971); N. M. Stat. Ann. § 41–22–7 (Supp. 1971); N. D. Cent. Code § 29–07–01.1 (Supp. 1971); Ohio Rev. Code Ann. § 2941.51 (Supp. 1971); S. C. Code Ann. § 17–283 (Supp. 1971); Tex. Code Crim. Proc., Art. 1018 (1966); Va. Code Ann. § 14.1–184 (Supp. 1971); W. Va. Code Ann. § 62–3–1 (Supp. 1971); Wis. Stat. Ann. § 256.66 (1971).

[9] For fiscal 1971 $400,000 was appropriated to fund the program.

Whether the returns under the statute justify the expense, time, and efforts of state officials is for the ongoing supervision of the legislative branch.

The court below invalidated this statute on the grounds that it "needlessly encourages indigents to do without counsel and consequently infringes on the right to counsel as explicated in Gideon v. Wainwright, supra." 323 F. Supp. 1230, 1233. In *Gideon*, counsel had been denied an indigent defendant charged with a felony because his was not a capital case. This Court often has voided state statutes and practices which denied to accused indigents the means to present effective defenses in courts of law. *Douglas* v. *California*, 372 U. S. 353 (1963); *Draper* v. *Washington*, 372 U. S. 487 (1963); *Lane* v. *Brown*, 372 U. S. 477 (1963); *Griffin* v. *Illinois*, 351 U. S. 12 (1956). Here, however, Kansas has enacted laws both to provide and compensate from public funds counsel for the indigent.[10] There is certainly no denial of the right to counsel in the strictest sense. Whether the statutory obligations for repayment impermissibly deter the exercise of this right is a question we need not reach, for we find the statute before us constitutionally infirm on other grounds.

II

Appellants have asserted in argument before this Court that the statute "has attempted to treat them [indigent defendants] the same as would any civil judgment debtor be treated in the State courts . . . ."[11] Again, in their brief appellants assert that "[f]or all practical purposes the methods available for enforcement of the judgment are the same as those provided by the Code of Civil

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[10] See n. 2, *supra*.

[11] Tr. of Oral Arg. 9. The State concedes that exemptions for other civil judgment debtors are broader than for indigent defendants, *id.*, at 10, a matter we will address forthwith.

Procedures or any other civil judgment." [12] The challenged portion of the statute thrice alludes to means of debt recovery prescribed by the Kansas Code of Civil Procedure.[13]

Yet the ostensibly equal treatment of indigent defendants with other civil judgment debtors recedes sharply as one examines the statute more closely. The statute stipulates that save for the homestead, "[n]one of the exemptions provided for in the code of civil procedure shall apply to any such judgment . . . ." [14] This provision strips from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors, including restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness, and exemption from attachment and execution on a debtor's personal clothing, books, and tools of trade. For the head of a family, the exemptions afforded other judgment debtors become more extensive, and cover furnishings, food, fuel, clothing, means of transportation, pension funds, and even a family burial plot or crypt.[15]

Of the above exemptions, none is more important to a debtor than the exemption of his wages from unrestricted garnishment. The debtor's wages are his sustenance, with which he supports himself and his family. The average low income wage earner spends nearly nine-tenths of those wages for items of immediate consumption.[16] This Court has recognized the potential of

[12] Brief of Appellant 7.

[13] See Kan. Stat. Ann. §§ 60–701 to 60–724, 60–2401 to 60–2419 (1964 and Supp. 1971).

[14] The exemptions in the civil code are set forth in Kan. Stat. Ann. §§ 60–2301 to 60–2311 (1964 and Supp. 1971).

[15] Kan. Stat. Ann. §§ 60–2304 and 60–2308 (1964 and Supp. 1971).

[16] Bureau of Labor Statistics, Handbook of Labor Statistics 281 (1968). Low-wage earners are defined as families with after-tax income of less than $5,000.

certain garnishment proceedings to "impose tremendous hardships on wage earners with families to support." *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 340 (1969).[17] Kansas has likewise perceived the burden to a debtor and his family when wages may be subject to wholesale garnishment. Consequently, under its code of civil procedure, the maximum which can be garnished is the lesser of 25% of a debtor's weekly disposable earnings or the amount by which those earnings exceed 30 times the federal minimum hourly wage. No one creditor may issue more than one garnishment during any one month, and no employer may discharge an employee because his earnings have been garnished for a single indebtedness.[18] For Kansas to deny protections such as these to the once criminally accused is to risk denying him the means needed to keep himself and his family afloat.

The indigent's predicament under this statute comes into sharper focus when compared with that of one who has hired counsel in his defense. Should the latter prove unable to pay and a judgment be obtained against him, his obligation would become enforceable under the relevant provisions of the Kansas Code of Civil Proce-

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[17] The Court in *Sniadach* held that Wisconsin's prejudgment wage garnishment procedure, as a taking of property without notice and prior hearing, violated the Due Process Clause of the Fourteenth Amendment.

[18] Kan. Stat. Ann. §§ 60-2310 (b) and 60-2311 (Supp. 1971). Section 60-2310 also provides further debtor protection from wage garnishment at a time of disabling personal sickness and from professional collecting agencies. See Kan. Stat. Ann. § 60-2310 (c) and (d) (Supp. 1971). See also Bennett, the 1970 Kansas Legislature in Review, 39 J. B. A. K. 107, 178 (1970), which points out that the State's restrictions on garnishments have been made to conform to Tit. III of the federal Consumer Credit Protection Act, 82 Stat. 163. Kansas, however, provided significant wage exemptions from garnishment long before the federal Act was passed.

dure. But, unlike the indigent under the recoupment statute, the code's exemptions would protect this judgment debtor.

It may be argued that an indigent accused, for whom the State has provided counsel, is in a different class with respect to collection of his indebtedness than a judgment creditor whose obligation arose from a private transaction. But other Kansas statutes providing for recoupment of public assistance to indigents do not include the severe provisions imposed on indigent defendants in this case. Kansas has enacted, as have many other States, laws for state recovery of public welfare assistance when paid to an ineligible recipient.[19] Yet

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[19] Kan. Stat. Ann. § 39–719b (1964); § 59–2006 (Supp. 1971). Section 39–719b deals mainly with the recovery of assistance from an ineligible recipient. Yet, even when the welfare recipient is deemed to have defrauded the State, he still escapes the immediate interest accumulations and denial of exemptions imposed on indigent defendants:

"§ 39–719b. Duty of recipient to report changes; action by board; recovery of assistance obtained by ineligible recipient. If at any time during the continuance of assistance to any person, the recipient thereof becomes possessed of any property or income in excess of the amount ascertained at the time of granting assistance, it shall be the duty of the recipient to notify the county board of social welfare immediately of the receipt or possession of such property or income and said county board may, after investigation, cancel the assistance in accordance with the circumstances.

"Any assistance paid shall be recoverable by the county board as a debt due to the state and the county in proportion to the amount of the assistance paid by each, respectively: If during the life or on the death of any person receiving assistance, it is found that the recipient was possessed of income or property in excess of the amount reported or ascertained at the time of granting assistance, and if it be shown that such assistance was obtained by an ineligible recipient, the total amount of the assistance may be recovered by the state department of social welfare as a fourth class claim from the estate of the recipient or in an action brought against the recipient while living."

the Kansas welfare recipient, unlike the indigent defendant, is not denied the customary exemptions.[20]

We recognize, of course, that the State's claim to reimbursement may take precedence, under appropriate circumstances, over the claims of private creditors and that enforcement procedures with respect to judgments need not be identical.[21] This does not mean, however, that a State may impose unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor. The State

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[20] There appears to be a further discrimination against the indigent defendant as contrasted with the delinquent welfare recipient. The recoupment statute applicable to indigent defendants provides for the accumulation of 6% annual interest from the date expenditures are made for counsel or other legal defense costs. Kan. Stat. Ann. § 22–4513 (Supp. 1971). The interest build-up for the indigent defendant would not be insubstantial. In the five years before the judgment became dormant, interest accumulations could lift appellee's $500 debt to almost $670. If the dormant judgment is revived within the statutorily prescribed two years, the principal and interest might total over $750. (The interest presumably would run while the judgment was dormant since "[a] dormant judgment may be revived and have the same force and effect as if it had not become dormant . . . ." Kan. Stat. Ann. § 60–2404 (Supp. 1971).

Kansas also has a statute providing that all judgments shall bear 8% interest from the day on which they are rendered. Kan. Stat. Ann. § 16–204 (Supp. 1971) (recently amended from 6%). Presumably this statute would cover the "debts" of welfare recipients once they are reduced to judgment. The debt of the indigent defendant, however, runs from the date the assistance is granted, while any interest on the debt of a welfare recipient would presumably run from the date of judgment.

[21] For example, Kansas does not extend its exemptions with respect to wage garnishment to any debt due for any state or federal tax, Kan. Stat. Ann. § 60–2310 (e)(3) (Supp. 1971). This type of public debt, however, differs from the instant case in representing a wrongful withholding from the State of a tax on assets in the actual possession of the taxpayer and not, as here, a debt contracted under circumstances of indigency.

itself in the statute before us analogizes the judgment lien against the indigent defendant to other "judgments under the code of civil procedure." But the statute then strips the indigent defendant of the very exemptions designed primarily to benefit debtors of low and marginal incomes.

The Kansas statute provides for recoupment whether the indigent defendant is acquitted or found guilty. If acquitted, the indigent finds himself obligated to repay the State for a service the need for which resulted from the State's prosecution. It is difficult to see why such a defendant, adjudged to be innocent of the State's charge, should be denied basic exemptions accorded all other judgment debtors. The indigent defendant who is found guilty is uniquely disadvantaged in terms of the practical operation of the statute. A criminal conviction usually limits employment opportunities. This is especially true where a prison sentence has been served. It is in the interest of society and the State that such a defendant, upon satisfaction of the criminal penalties imposed, be afforded a reasonable opportunity of employment, rehabilitation and return to useful citizenship. There is limited incentive to seek legitimate employment when, after serving a sentence during which interest has accumulated on the indebtedness for legal services, the indigent knows that his wages will be garnished without the benefit of any of the customary exemptions.

Appellee in this case has now married, works for a modest wage, and has recently become a father. To deprive him of all protection of his wages and intimate personalty discourages the search for self-sufficiency which might make of the criminally accused a contributing citizen. Not only does this treatment not accord with the treatment of indigent recipients of public wel-

fare or with that of other civil judgment debtors,[22] but the Kansas statute also appears to be alone among recoupment laws applicable to indigent defendants in expressly denying them the benefit of basic debtor exemptions.[23]

III

In *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966), the Court considered a situation comparable in some respects to the case at hand. *Rinaldi* involved a New Jersey statute which required only those indigent defendants who were sentenced to confinement in state institutions to reimburse the State the costs of a transcript on appeal. In *Rinaldi*, as here, a broad ground of decision was urged, namely, that the statute unduly burdened an indigent's right to appeal. The Court found, however, a different basis for decision, holding that "[t]o fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions . . . is to make an invidious discrimination" in violation of the Equal Protection Clause. *Id.*, at 309.

Rinaldi affirmed that the Equal Protection Clause "imposes a requirement of some rationality in the nature of the class singled out." *Id.*, at 308–309. This requirement is lacking where, as in the instant case, the State has subjected indigent defendants to such discriminatory conditions of repayment. This case, to be sure, differs from *Rinaldi* in that here all indigent defendants are treated alike. But to impose these harsh conditions on a class of debtors who were provided counsel as required

[22] The statutes of various other States, *e. g.*, Alaska, South Carolina, and West Virginia, provide, as does Kansas, for recovery against indigent defendants in the same manner as on other judgments. Unlike Kansas, however, these States do not expressly subject indigents to conditions to which other civil judgment debtors are not liable. See n. 8, *supra*, for citations.

[23] See n. 8, *supra*, for citations.

by the Constitution is to practice, no less than in *Rinaldi*, a discrimination which the Equal Protection Clause proscribes.

The Court assumed in *Rinaldi*, *arguendo*, "that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefited from county expenditures." *Id.*, at 309. We note here also that the state interests represented by recoupment laws may prove important ones. Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency. Many States, moreover, face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases [24] and stages of prosecution.[25] Such trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs. Finally, federal dominance of the Nation's major revenue sources has encouraged State and local governments to seek new methods of conserving public funds, not only through the recoupment of indigents' counsel fees but of other forms of public assistance as well.

We thus recognize that state recoupment statutes may betoken legitimate state interests. But these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors to whom the statute itself repeatedly makes reference. State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-

[24] *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Douglas* v. *California*, 372 U. S. 353 (1963); *Argersinger* v. *Hamlin*, *ante*, p. 25.

[25] *Coleman* v. *Alabama*, 399 U. S. 1 (1970); *Mempa* v. *Rhay*, 389 U. S. 128 (1967); *United States* v. *Wade*, 388 U. S. 218 (1967); *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

sufficiency and self-respect. The statute before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law.

The judgment of the court below is affirmed.